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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of South Australia,

AND IN THE

Vice-Admiralty Court,

FROM JULY, 1865, TO DECEMBER, 1866.

BY

L. J. PELHAM, Esq.,

ASSOCIATE.

ADELAIDE:
PRINTED BY ANDREWS, THOMAS, AND CLARK,
GRENFELL STREET.

1867.

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JUDGES.

Richard Davies Hanson, Esquire ... . Chief Justice.

Benjamin Boothby, Esquire ..... Second Judge.

Edward Castres Gwynne, Esquire ..... Third Judge.

JUDGE OF VICE-ADMIRALTY COURT.

Richard Davies Hanson, Esquire.

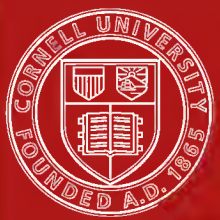

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TABLE OF CASES REPORTED.

ACTION for negligence, in setting in motion a saw mill without notice to plaintiff, whereby plaintiff's hands and arms were cut and permanently injured. Plea—not guilty. Defendant gave evidence that the saw was connected with the machinery by a shifting belt; that it was plaintiff's duty, when the machinery was stopped, to disconnect the saw by shifting the belt on to the loose pulley, which would have prevented the saw from moving when the machinery was again set in motion. The Judge, on conclusion of defendant's case, held that there was no evidence to go to the Jury, and directed the plaintiff to be called. Plaintiff by his counsel appeared, and objected that he could not be nonsuited against his consent. The Judge overruled the objection. Held, on motion to set aside nonsuit, that the Judge was right.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF SOUTH AUSTRALIA.

JULY 18, 1865.

DAWES AND WIFE *against* QUARREL AND WIFE.

LOCAL COURTS.—Validity of Local Court—Motion to quash certiorari, and to set aside ca. sa. on the ground that there was no such Court legally constituted as the Local Court of Adelaide. Held by Boothby, J., and Gwynne J., Hanson, C.J., dissentiente. That the Legislature of South Australia has no power to constitute Courts—and that therefore the Local Court of Adelaide, professed to be established under the Local Courts Act, had no existence. By Gwynne, J.—That the provisions in the Local Courts Act, with regard to the mode of trial, &c., of Civil actions was repugnant to the laws of England, and therefore void.

THIS was an action commenced in the Local Court of Adelaide, under the provisions of the Local Courts Act, No. 15, 1861, against the defendants, to recover damages for slanderous words spoken by the wife of the defendant of the wife of the plaintiff. Plea—not guilty, and justification. The action was tried before the Special Magistrate and a Jury. Verdict for plaintiffs—damages, £20 and costs. On the 25th day of April plaintiffs removed the judgment upon that verdict into this Court, and sued out a writ of *capias ad satisfaciendum*, upon which the defendants were arrested. On the 24th June a rule *nisi* was obtained, calling upon the plaintiffs to show cause why the writ of *certiorari* to bring up a judgment between the same parties from so-styled Local Court of Adelaide, issued in this cause, should not be quashed, and why the writ of *capias ad satisfaciendum*, issued out of this Court by the abovenamed plaintiffs against the abovenamed defendants, should not be set aside, on the grounds that there was no such Court legally constituted as the Local Court of Adelaide, and that there was

no judgment of this Court to warrant the issuing of the said writ of *capias ad satisfaciendum*. The rule was argued on the 8th July, the Attorney-General (*Mr. Andrews*) for plaintiffs; *Mr. Stow, Q.C.*, for defendants, in support of the rule. The Court now delivered judgment.

GWYNNE, J.—In this case a rule has been obtained by *Mr. Stow*, calling upon the plaintiff to "show cause why the writ of *certiorari* to bring up a judgment between the same parties, from the so-styled Local Court of Adelaide, issued in this cause should not be quashed, and why the writ of *capias ad satisfaciendum*, issued out of this honourable Court by the plaintiffs against the defendants, should not be set aside, on the ground that there is no such Court legally constituted as the Local Court of Adelaide, and that there is no judgment of this Court to warrant the issuing of the said writ." Of these Local Courts there are in South Australia some thirty. They were first established by the Local Act, No. 5, of 1850, but the principal Act now relating to them is No. 15 of 1861, and this confers upon them very extensive jurisdiction, both criminal and civil. They have cognizance of all personal actions (including libel, slander, breach of promise of marriage, and malicious prosecution), when the debt or damage claimed is not more than £100; but, by consent, they have jurisdiction in any action without any limitation as to amount of claim. (See secs. 23, 24, and 25.) By the 27th sec. it is enacted that "a Local Court of Full Jurisdiction shall have cognizance of any action in which the title to any corporeal or incorporeal hereditament or easement shall be in question, or in which the validity or effect of any devise, bequest, or limitation under any will or settlement, or document in the nature of a settlement, may be disputed." These Courts have also jurisdiction to try actions of ejectment. (See, amongst others, secs. 159 and 169). The only qualification of the Judge (called a Special Magistrate) who presides in these Courts, and exercises this extensive jurisdiction, is that he shall be a Justice of the Peace. (See sec. 8.) And although in Jury cases he is required to direct the Jury upon all matters of law, and decide upon the admission or rejection of evidence (sec. 18), it is not necessary that he should be bred to the law, or have had any legal training whatever. The Jury which the Special Magistrate is to direct "upon all matters of law" is not a Jury of "twelve good men and true," but a Jury of four Jurymen (sec. 43), and even this sort of Jury can only be obtained, in civil

matters, upon the payment of £2 (sec. 37), and in criminal matters is refused altogether. Then comes this extraordinary enactment—"All causes and matters cognizable under this Act by a Court of Full Jurisdiction shall be heard and determined in open Court, in a summary way, according to equity and good conscience, and the substantial merits of the case, by and before, &c., a Special Magistrate and two Justices of the Peace for the said Province, or a Jury." (See sec. 13.) I need only allude to two more provisions of the Act—the one relating to appeals to this Court (see secs. 56 *et seq.*); the other (sec. 54), which enables a successful party to remove the judgment of the Local Courts into this (the Supreme) Court, when it is to have the same force as if originally a judgment of this Court. It is unnecessary to allude to the Criminal Jurisdiction of Local Courts, except as illustrative of the genius of our local legislation. Certain felonies are matters cognizable under the Act by a Court of Full Jurisdiction (sec. 115), and therefore, pursuant to sec. 13, were to be heard and determined, not upon the broad principles and liberal spirit of the English Criminal Law, but "in a summary way, according to equity and good conscience, and the substantial merits of the case, before the Special Magistrate and two Justices, without a Jury." This novel mode of administering criminal justice, however, no longer exists, as, in the case of the Queen v. Neville, I held that thus to try an Englishman encroached upon the great principle of English law, "that no man is to be punished until found guilty by a Jury of his peers;" and, being supported in that view by my learned colleague Mr. Justice Boothby, the Criminal Jurisdiction of Local Courts has ceased to be exercised. But in reference to civil suits, what do those words mean, "according to equity and good conscience, and the substantial merits of the case?" Is the principle of deciding implied by these words applicable alike to Jury cases and to cases heard before three Magistrates, or only to the latter? The requirement that the Special Magistrate is in Jury cases to direct the Jury upon all matters of law, and decide upon the admission and rejection of evidence would seem to imply that the "equity and conscience" principle should only apply to cases where there is no Jury; but even this conclusion seems doubtful, for although by sec. 56 an appeal is given to either party in a cause dissatisfied with the determination or direction of the Local Court upon a point of law or upon the admission or rejection of evidence, yet the Supreme Court shall, if of opinion that substantial justice (I suppose upon the equity

and conscience principle) has been done between the parties, discharge the rule or order. Is it not meant that this new principle shall pervade the whole procedure of Local Courts? Is it not an attempt to administer what is called attributive justice? To me it appears that it is, and I cannot convey my sentiments on this attempt better than by quoting the words of *Mr. Best*:—"To administer perfect attributive justice in all questions to which the innumerable combinations of human action give rise is the high prerogative of Omniscience and impeccability; for to this end are required, not only an unclouded view of the facts as they have occurred, and a decision alike unerring and uncorrupted on the claims of the contending parties, but a complete foresight of all the consequences, both direct and collateral and down to their remotest ramifications, which will follow from that decision. The hopelessness of ever accomplishing this became early visible to the reflecting portion of mankind; and the observation of nature having taught them that great ends are best attained by the steady operation of fixed general laws, they conceived the notion of framing general laws for the government of society—rules based on the principle of securing the largest amount of truth and happiness in the largest number of cases, however their undeviating action may violate attributive justice or work injury in particular instances."—*Best* on evidence, edition of 1860. The law of England (including in that expression the law of evidence) is built up of such general rules, and in that fact consists its excellence. In that fact consists all it possesses of certainty and impartiality of administration. "*Optima est lex quæ minimum relinquit arbitrio judicis*," says Lord Bacon; but in the Local Courts, as it appears to me, the whole matter is left to the will and discretion of the presiding Magistrate. His power is absolute. He may declare facts proved or disproved altogether at his will and pleasure. All he is required to do is to determine according to his own idea of equity and good conscience, and the substantial merits of the case as they appear to him, and this in a question of title to real estate, the validity of a will, or title in an action of ejectment. It is true that in Jury cases the Special Magistrate is required to direct the Jury upon all matters of law, and to decide upon the admission or rejection of evidence. But is not this a mockery? With every respect for the gentlemen who have been appointed to preside in Local Courts, and whom I am bound to admit have, as a whole, exhibited great integrity, and carried themselves wonderfully well, considering the diffi-

culty and novelty of their position; yet I cannot refrain from observing that no men who were not bred to the law, and had very considerable practical experience in its administration, can possibly perform the duties imposed on Special Magistrates by the Local Courts Act. On this head I will quote from 12 Co., c. 63, M. 5, Jac. 1:—" . . . . Then the King said that he thought the law was founded upon reason, and that he and others had reason as well as the Judges. To which it was answered by me that true it was that God had endowed His Majesty with excellent science and great endowments of nature, but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it," &c. Seeing, therefore, that these Courts decide upon the inheritance, reputation, goods, and liberty of the Queen's subjects by a course of procedure unknown to the law of England, that they so decide without a Jury of twelve men, and that in the appointment and tenure of office of the Special Magistrates the English system of judicature is altogether ignorant, I am of opinion that the Local Courts Act of 1861 is repugnant to the law of England. It appears to me, moreover, that the Local Courts Act of 1861 was not within the competency of the Local Legislature of South Australia, inasmuch as it abolishes *pro tanto* the Supreme Court, this Court being founded, not immediately, though mediately, on Imperial legislation. I am also of opinion that it is opposed to the Constitution Act. The 30th and 31st sections of that Act provide that the Judges shall hold their office during their good behaviour, and shall be removable only by the Queen, upon the address of both Houses of Parliament. Thus is the independence of the Judges secured for the public good; but of what avail is this provision to the public if the great mass of the current business of the Supreme Court is removed from the Judges and conferred upon gentlemen dependent for their offices upon, not to say the Attorney-General, but the Ministry of the day. And surely the Judge is practically, so far as the public is concerned, as much removed by taking the business from his Court and jurisdiction as he would be by taking him from that business and jurisdiction. Another question was raised by *Mr. Stow* in this case, and very ably argued by him—namely, whether the Local Legislature of this province possess the right

of erecting Courts of Judicature. The Legislature of South Australia, like that of the other Australian Colonies, is the creature of legislative enactment; and consequently the extent of its power and authority must be found in the proper construction of the Imperial Statute creating it. By the 13th and 14th Vict., chap. 59, sec. 14, it is enacted that the Governors of the said Colonies of Victoria, Van Diemen's Land, South Australia, and Western Australia respectively, with the advice and consent of the Legislative Councils to be established in the said colonies under this Act, shall have authority to "make laws for the peace, welfare, and good government" of the said colonies respectively, subject, &c., "provided always that no such law shall be repugnant to the law of England." This enactment, it will be observed, was directly applicable to the mixed Council, but by the effect of the 32nd section of the said Act, and the Constitution Act of this province, the powers and functions of the mixed Council are vested in the present Legislature. It has been said that the power to make laws for the peace, welfare, and good government of a community necessarily implies the authority to erect Courts of Judicature, because laws would be useless without Courts of Judicature to administer them. To this, however, *Mr. Stow* replies that the same argument would prove the right of the Local Legislature to appoint a Governor. The fact is, that those who make use of the above argument forget that by the Constitution of England the executive power is in the Sovereign, and that the right of erecting Courts is vested in the Crown, and is universally exercised by charter or letters patent. Whatever fanciful theories may be resorted to to explain away this or to account for that, however the matter may be sophisticated, to a matter of construction it must come. And the same rules of construction which are applied to English Acts of Parliament generally must be applied to the present case. "As one part of a Statute (says Dwarris) is properly called in to help the construction of another part, and is fitly so expounded as to support and give effect, if possible, to the whole, so is the comparison of one law with other laws made by the same Legislature, or upon the same subject, or relating especially to the same point enjoined for the same reason, and attended with a like advantage." Again (says Dwarris), "where Acts are *in pari materia*, if the same words be used in both Statutes, a distinction made in the one is a legislative exposition of the sense in which it is to be understood in the other." (See Dwarris on Statutes, p. 568, and the authorities there quoted, and

particularly the judgment of Justice Buller in King v. Smilie, 4 T. R.) Before applying these rules to the case before the Court, I will observe that I treat the words, peace, *order*, and good government," and the words "peace, *welfare*, and good government," as substantially the same. Now, the Act establishing this colony, 4 and 5 William IV., cap. 95, in addition to the words to make laws for the "peace," &c., are the words "and to constitute such Courts," &c.; so it is in 1 and 2 Vict., cap. 60; and so in the Swan River Act (10 Geo. IV., cap. 22). In addition to the words to make, &c., such laws, &c., for the peace, &c., are the words "and to constitute such Courts," &c. But in the 13th and 14th Vict., cap. 59, the words are to make laws for "the peace," &c., all reference to the erection of Courts being omitted. The three former Acts show the meaning of the words "to make laws for the peace," &c.; there they do not mean "to erect Courts;" for if they did, the words "to erect Courts" would not have been superadded. Now, this Act (13 and 14 Vict., cap. 59), being *in para materia* with the former Acts, and the same words to make laws "for the peace, order (or welfare), and good government," being used in both, it is a legislative exposition of the sense in which they are to be understood. To make laws "for the peace," &c., in the three former Acts does not extend to the power of establishing Courts, nor do they in 13 and 14 Vict., cap. 59. It is also true, as put by the learned council *Mr. Stow*, that the universal and continuous practice of the mother country in respect to the establishment of Courts of Judicature in her colonies has been to keep that delicate matter in her own hands. The Sovereign, by virtue of his prerogative, strengthened by legislation, erects them by charter or letters patent. Such was the course pursued in reference to Newfoundland; such was the course pursued in reference to the Cape of Good Hope, Sierra Leone, Ceylon, Mauritius, New South Wales, Van Diemen's Land, and Victoria; and I am not aware that in any one instance has a Colonial Legislature erected Courts of Judicature without power, either mediate or immediate, conveyed in express terms from the Imperial Parliament. In conclusion, I would only remark that, as in my view it was not necessary to determine as to the general power of the Local Legislature to erect Courts, I have not gone so elaborately into that matter as I otherwise should have done; in fact, I should not have expressed any opinion on the subject unless I had been requested by my two learned colleagues to express such an opinion. I am of opinion that this rule should be made absolute.

BOOTHBY, J.—It was conceded on the argument on this rule that—unless the words of the Imperial Statute, 13 and 14 Vict., cap. 59, sec. 14, conferring power on the Legislature of this province, to be established under that Act, "to make laws for the peace, welfare, and good government of the said colony: provided always that no such law shall be repugnant to the law of England"—no authority for the creation of Courts is possessed by the existing Parliament, inasmuch as no express words giving such power are to be found in the Royal Charter or Imperial Statute since the passing of 5 and 6 Vict., cap. 61 (1842). In the *addenda* to my judgment in Payne v. Dench, on 25th June, 1861, in which this Court decided that a formerly existing Court of Appeal had ceased to have any lawful authority, I traced the history of all Imperial Statutes relating to the powers of the Legislature of this province, showing how authority to create Courts had been given by the express words of the *first two* of the Imperial Acts, but that the *third* contained no such provision by express words; and I therefore declared my judicial opinion that no power to create Courts had been possessed by the Legislature of this province since the year 1842, when the nominee Council of seven members was first created, and which continued until the creation of the mixed Council of nominees and representative members in 1851. I gave a similar expression of opinion before a Committee of the House of Assembly of this province in August, 1861. (See Council Papers of that year, containing the report of such Committee, and the evidence before it; and the Blue-book of the Imperial Parliament, containing such report and evidence, presented to both the Houses by command of Her Majesty, August, 1862, pp. 33, 37, 47, 49, 50.) Although I disclaimed before that Committee the responsibility of a judicial decision, I wish what I then said in respect of any power in the existing Legislature to create Courts to be regarded as here repeated. To construe the words in question as conferring a power to create Courts would contravene all the existing rules of law as to the construction of words in any Statute affecting the prerogative of the Crown. No instance can be found of such a construction being attempted; and the fact that all extant Royal Charters and Imperial Statutes conferring powers of legislation on colonies *acquired by settlement* provide also, and at the same time by express words, for the creation of Courts to administer such legislation, amounts to a reiterated legislative declaration that such express words are necessary. The Charters and Statutes relating to ceded or

conquered colonies, such as Canada and the Mauritius—where the French law still largely prevails—and at the Cape of Good Hope, the Dutch law —afford no precedent for the rules of law relating to Colonial Legislatures where the law of England is paramount. But even in Canada the 14 Geo. III., cap. 83 (1774), making provision for the government of Quebec—by cl. 12, the Governor and Council are to make laws for the "peace, welfare, and good government of the province;" and in the 17th clause of the Act an interpretation is given of the meaning of these words. Cl. 17—"That nothing herein contained shall extend or be construed to extend or limit His Majesty from erecting, constituting, and appointing such Courts of Criminal, Civil, and Ecclesiastical Jurisdiction within the said province, &c., as His Majesty shall think necessary." It is the undoubted prerogative of the Crown, as the fountain of Justice, to institute Courts and to appoint Judges for the administration of laws made by the Legislature—a prerogative which cannot be taken away or surrendered by Her Majesty except by the clearest words of an Imperial Statute, to which Her Majesty, as an Estate of the Parliament, has assented. If the law were otherwise, then might the Queen's prerogative be frittered away by mere construction of Her Courts of Law, to prevent which the positive rule of law, as to express words being necessary to affect the prerogative, is so well established. The law being so, a construction of the words in question, as contended for by the Attorney-General, if adopted, would introduce another objection fatal to the validity of the Local Courts Act of 1861, as not having been reserved for the royal assent, as all Bills of the Provincial Legislature affecting the prerogative are by law required to be. The further argument in support of the discharge of this rule, that the jurisdiction in question of the Local Courts can be supported as being only a change of name of the Courts of General and Quarter Sessions and Petty Sessions, established by Ordinance No. 1, January, 1837; the Courts of Resident Magistrates for the recovery of small debts, and the punishment of minor offences, No. 2, November, 1837, is without any support of the validity of the Local Courts Act as to the jurisdiction in contest can be sustained as he seeks to establish, for by the plainest words these Ordinances are assumed to be repealed by Ordinance No. 6, 1850, sec. 1. All these Ordinances, together with the Jury Ordinance, No. 1, November, 1837, providing for the constitution of Juries—Grand and Petty—are, however, in legal effect Imperial Statutes, having been confirmed by sec. 2 of 5 and 6 Vict., cap. 61, and as such are incapable

of repeal by the Legislature of this province, unaided by Imperial legislation, for that would be repugnancy of the plainest nature—the Imperial Parliament providing one thing and the Colonial Legislature the very opposite. The Queen, as one of the Estates of the Imperial Parliament, cannot, by any argument founded on mere construction, be made to say one thing, and as an Estate of the Legislature of this province the very reverse. To erect Courts for the administration of the criminal and commercial law, and the laws of real estate, is to make laws not only for the people of this province, but also for the Queen's subjects residing in all other parts of Her dominions, and having fixed or moving property in this province, or coming here for the purposes of business or pleasure. The restriction against repugnancy is founded on a wise policy of the Imperial Parliament that the laws regulating and protecting the lives, liberties, and property of British subjects throughout every province of Her Majesty's dominions where the laws of England prevail, shall exist as a harmonious whole, in which there may be difference without discord; such harmony never to be broken without obvious necessity. The creation of District Councils, first in New South Wales, and afterwards by Imperial Legislation extended to this colony, are all founded on the express provisions of Imperial Legislation. Now, New South Wales had always the power to make "laws for the peace, welfare, and good government" of that colony; yet was it necessary that powers to create such District Councils should be given by the Imperial Parliament by express provisions in 1842. So also the formation of District Councils in this province was never attempted until the receipt of express power from the Imperial Parliament in 1850, under which the existing District Councils are established. I am of opinion that this rule should be made absolute in the terms in which it is moved.

HANSON, C.J.—In this case a judgment was obtained against the defendants in the Local Court of Adelaide for damages and costs to an amount exceeding £20, which was removedby *certiorari* into this Court under the provisions of the Local Courts Act, by force of which removal it becomes a judgment of this Court, and upon such judgment a writ of *capias ad satisfaciendum* has issued out of this Court against both the defendants, under which they have been taken in execution. *Mr. Stow* obtained a rule to show cause why such judgment and execution should not be set aside, on the ground that there is no Local Court of Adelaide. The point relied upon by the defendants, and on which the rule was

granted, is that the power to make laws for constituting Courts for Judicature is not possessed by the Legislature of this colony, as it is not included in the general power to make laws for the peace, welfare, and good government of the colony, but requires to be conferred by express words; and this is the question which we have now to decide. Besides this, however, there was the further question whether, assuming the power to constitute Courts to exist, that power had been rightly exercised —whether the provisions of the Local Courts Acts were repugnant to the law of England. I could have wished to have been able to give fuller consideration to this question, and to have had the assistance of hearing it fully argued by counsel; but it was not raised upon the argument on the rule. In the former cases which had arisen upon this question I founded my judgment upon what might be termed the popular meaning of the words, as though they meant a difference in some point more or less material to the laws existing in England now or at some former time, or to some idea of the essential features of the law of England. Tried by that test I was of opinion that the Local Courts Act was not so repugnant. It provided, no doubt, for the administration of justice by unlearned persons, according to equity and good conscience and the substantial justice of the case, whatever these words might mean; but it also provided for the summoning of a Jury of four persons—Jurors because they were sworn to give their verdict according to the evidence —and for an appeal to the Supreme Court, in cases where the Special Magistrates had improperly received or rejected evidence, or had given a wrong direction in point of law. It was true that the Supreme Court, even if they thought the Magistrate had been wrong in any of these particulars, was not bound to set aside the judgment of the Court below if it thought that justice had nevertheless been done; but that was in accordance with the rules by which the Court in most cases guided itself in granting or refusing rules for new trials. It therefore seemed to me that sufficient security was provided for the ultimate administration of justice according to law to prevent the Local Courts Act from being repugnant to the law of England, even if the word repugnant was construed in the popular sense to which I have alluded. I have, however, upon further reflection, considerable doubts whether that was the true meaning of the word, and I could have wished to have had further time to consider that question. I am inclined to think that the term repugnant should be construed in its strict legal sense, and that in order

to make one law repugnant to another, the two must, so to speak, meet upon the same ground—*i.e.*, refer to the same subject-matter. The question was whether it was repugnancy to the law of England as existing in England, or to the law of South Australia, in so far as it was founded upon the law of England, that would make an Act invalid—and I incline to the opinion that it is the former. It does not appear to me that any other meaning could have been intended by the Imperial Legislature, since, understood in any other sense, the question, whether or not any Act altering the existing law was in fact repugnant, could only be one of degree, and it could scarcely have been intended to make the validity of colonial laws depend on the question if whether they differed, more or less, from some actual or ideal standard. And this view appears to me to be confirmed by the illustration of repugnancy given in the text-books. Thus in "Bacon's Abridgment" an instance is given—"If a man makes a feoffment in fee upon condition that the feoffee shall not alien, such condition is void, being repugnant to the nature of the estate." This showed that repugnancy meant a conflict between two things, as in the instance given between a condition and the nature of an estate, so that both could not subsist together. But that is not the case with regard to the Local Courts Act. It is no part of the law of England that actions of ejectment in South Australia should be tried by a Jury, and the law of England remains unaffected by any local legislation upon the subject. It therefore appears to me, in the absence of any decision upon the subject, that the question of repugnancy could only properly arise in cases in which the English law provided for something within a colony. I may illustrate it thus:—If the Legislature of South Australia enacted that upon a man being declared a bankrupt in England all his estate and effects within the colony should vest in the Official Assignee for the benefit of his colonial creditors, or that the assent of the Queen to Acts should not be necessary, such enactments would be repugnant to the law of England because they conflicted with the law of England which applied to these matters. But nothing of the sort was the case here. It appears therefore to me that the Local Courts Act is not under either construction repugnant to the law of England.

In the case of The Queen v. Neville I have already expressed my opinion that the power to make laws for constituting Courts is included in the general words peace, welfare, and good government; and, but for

the distrust in my own conclusions, necessarily inspired by the circumstance that upon a point which appears to me so elementary, both of my learned colleagues have formed a different opinion from my own, I should have contented myself with referring to that judgment. As it is, however, I feel bound to examine the question in detail, not merely because of its intrinsic importance, but also for the purpose of explaining fully the reasons which have compelled me to differ from my learned colleagues. As I understand the argument for the defendants, it is not denied that the construction which I have put upon the words "peace, welfare, and good government" is warranted by the words themselves, apart from all constitutional principles or statutory limitations which might narrow their signification. On the contrary, it was fully conceded by *Mr. Stow* that the administration of justice—the repression of crime —the conviction and punishment of offenders—the acquittal of the innocent—the decision of conflicting claims between party and party—are essential parts of good government; that, in fact, there can be no government worthy of the name which does not include some arrangements for the accomplishment of these objects. And no one, I conceive, would dispute this proposition. The Habeas Corpus Act itself is, both in substance and form, an Act making provision for the better administration of justice; but it is also a most essential security for good government. It was once said by Lord Erskine, with a pardonable exaggeration, that the whole machinery of the British Government—King, Lords, Commons, Army, Navy, Judges, and Magistrates—existed for no purpose but to bring twelve men into the Jury-box; and I confess that I so far agree with him as to feel some surprise at being asked so to construe the words peace, welfare, and good government as to hold that they do not include the making better provision for the administration of justice. However, the point has been raised, and nothing remains for me but to give my reasons for adhering to the opinion I had formed.

The construction now contended for, viz., that the power to make laws for the peace, welfare, and good government of a colony does not include the power to make provision for the administration of justice, in which is included the constitution of Courts, is rested upon two grounds. First, that any other construction would involve an interference with the royal prerogative; and, second, that it would be at variance with the plain intention of the Imperial Parliament, as shown by the provisions of the Act 13th and 14th Vict., cap. 59. The first argument, as I

understand it, is that the administration of justice, including the constitution of Courts, is a part of the royal prerogative, and that though the Parliament of the United Kingdom may make laws for the constitution of Courts, yet that no other Legislature within the British dominions can do so, unless the power is conferred in express terms. It might perhaps be a sufficient answer to this to say that the power to make provision for the better administration of justice in the sense in which those words are used in the 13th and 14th Victoria never belonged to the Crown. When once Courts of Judicature, embracing all jurisdiction known to the Common Law, had been established in a colony possessing representative institutions, as was the case with New South Wales, and would be the case with Victoria and Van Diemen's Land before the clause containing those words could have any effect, the Crown could make no further provisions on the subject. It could not create new Courts, or alter the constitution of those that existed. (Long v. Bishop of Cape Town, 11 W.R.) I think it, however, more satisfactory to examine the principle upon which the objection rests, and how far it has any support in the practice which has hitherto prevailed in colonies owing their constitution to the Crown. And in doing this we may confine our attention to Provincial Governments, leaving out of consideration Charter and Proprietary Governments and colonies of conquest before they had received constitutions, to which latter class belong Ceylon, Mauritius, the Cape of Good Hope, &c., &c. The former were strictly limited in the exercise of their powers by their Charter, and the latter were governed by the sole authority of the Crown. When, however, the latter received the grant of a Constitution, they stood upon precisely the same footing as Provincial Governments with regard to the royal prerogative and the rights of the people (Campbell v. Hall, Cowp. 209). At Common Law there were, necessarily, at the founding of a plantation or colony only two elements for the establishment of government the constitution of Courts and the making of laws, viz., the power of the Crown, and the privileges of the people. Both of these were parts of the Common Law, which, as Englishmen, the new settlers carried with them to the colony. The King 'possessed all that power over the subjects which, by the Common Law of the land, abstracted from all Acts of Parliament and grants of liberties to the subjects, the King could lawfully exercise in England.' (1 Chal., p. 283.) And the people took with them the law of England, which included the two essential privileges that no taxes could be imposed upon

them, nor any changes made in the laws to which they were subject, without their consent through their representatives. (Com. Dig. Ley. C., Campbell v. Hall, Cowp. 209, 1 Chal., p. 195, 2 Chal., p. 302.) These two sources of power were, however, abundantly sufficient for the purpose; and, so far as I am aware, Parliament was never called upon to confer powers of government or legislation in a colony by occupation till the foundation of the colony of Swan River. The King might appoint a Governor to whom the exercise of his prerogative might be delegated, and might, either in person or through the instrumentality of the Governor, constitute Courts and appoint Judges, who were to administer justice according to the course of the Common Law. And although he could not impose taxes, or in a single particular change the law of England, which his subjects took with them, without the assent of the people through their representatives, he could convene a Legislature composed of the Governor, and of a Council nominated by the Crown, and of a House of Assembly elected by the freeholders and inhabitants. And when a Legislature was thus constituted, so that the assent of the people through their representatives might be given, the King, or the Governor in his name and on his behalf, with the advice and consent of these two bodies, might enact within the colony whatever laws the King, with the advice and consent of the two Houses of Parliament, might enact in England; the whole of such legislation, however, having no operation beyond the limits of the colony, and being, by the very fact that the colony was a possession of the realm of England, subject to the paramount authority of Parliament. With regard to Courts of Justice, the King might either establish them by virtue of his prerogative, by letters patent under the Great Seal of England or of the colony (2 Chal., p. 240), apart from the action of the Legislature; or, as in England, he might establish them by means of a law enacted with the advice and consent of the Legislature (Chal., p. 460, am. ed.). But there was this difference between these two methods. The power of the prerogative in this respect was exhausted by its exercise, so that the King could not, by virtue of his prerogative alone, alter the constitution of a Court which he had once constituted, or abolish it, or transfer its jurisdiction in whole or in part to any new Court, or create any new Court of concurrent jurisdiction. This he must do in his legislative capacity, and with the advice and consent of the other branches of the Legislature or of Parliament. (Chal. p. 460; Long v. Bishop of Cape Town, 11 W.R., 900; *in re* Bishop of Natal, 13

W.R., 549). So long, however, as any recognised branch of the Judicature had not been constituted in a colony, as a Court of Equity (1 Chal., p. 182) or a Court of Exchequer (2 Chal., p. 169), the King, by his prerogative, might erect such a Court. But when once Courts had been established possessing all the jurisdiction which was exercised by English Courts, then the power of the King by virtue of his prerogative ceased, and he was remitted, so to speak, to the power which he possessed of enacting laws for the purpose, with the advice and consent of the people, through their representatives. And in point of fact the greater portion of the Courts of Law in the colonies founded prior to the American war of independence were constituted by legislation within the colonies themselves. As is stated in Clarke's Colonial Law, p. 52, "with respect to Courts of Justice, though their establishment is usually directed in general terms by the King's commission and instruction to the Governor, their denomination, quality, number, and particular constitution are for the most part left to be settled by the Legislature of the colony." And, in fact, I have found that in every one of the British Colonies in the West Indies and North America, possessing representative institutions, by grant from the Crown, as in the conquered colonies, or under a royal commission authorizing the Governor to convene a House of Assembly to be elected by the people, as in the case of colonies by occupation, the various Legislatures, under their power to make laws for peace, order, and good government, have assumed, with the assent of the King and the approval of the law officers of the Crown, the power to make laws for the constitution of Courts of Justice ; and in every case, so far as I have been able to verify it, they have passed laws for the constitution of a Court of Error, consisting of the Governor and Council. In fact, during the long course of years, now nearly two centuries, which has elapsed since first questions as to the power of Colonial Legislatures were submitted to the opinions of the law officers of the Crown, including questions affecting directly and indirectly their power to constitute Courts of Justice; and although men of the highest eminence, including such names as Murray and Yorke, have given their opinion on this subject, such a question as that now raised never seems even to have suggested itself to them. They always tacitly assumed that the power to make laws for the establishment of Courts is incident to the general power of legislation. Perhaps we might from this circumstance draw an inference against the validity or the objection now urged. At any rate it would appear that the

existence of such a ground of objection had never suggested itself to any one until it was raised for the first time in this Court.

I do not know that this view so far will be disputed; but I am induced, by the importance of the question, to make two further remarks upon this branch of the subject. First—It has never been doubted that in colonies the King might confer upon the Governor the power of making laws for the constitution of Courts, with the advise and consent of the other branches of the Legislature. This is distinctly implied in the opinion of Northey, 1 Chal. op. 133, cited by *Mr. Stow.* But it is quite certain that the King could only delegate to the Governor such power as he himself possessed, and that he could confer upon the Legislature no power whatever. He could only enable them to exercise such powers as by the law of England were inherent in the people, and capable of being exercised by them through their representatives. This is necessarily implied in the undoubted proposition that he had no power to change the law, since he could not confer a power which he did not possess. It therefore follows that the power to pass laws for the constitution of Courts was a part of the rights of the people in their representative Assembly, and to assent to them a part of the prerogative, or rather of the power of the Crown. And, second, by the theory of the English Constitution, it is the King that enacts laws. No doubt, in order to their validity, it is requisite that the other Estates of the Realm—the Lords Spiritual and Temporal, and the Commons in Parliament assembled —should assent to the laws so enacted, but the enacting power is in the King. Now, this power of enacting laws, with the advice and consent of the people by their representatives, is an attribute of the Crown which at Common Law exists with at least equal fulness in a colony as in England. To assert the contrary would be to assert that the King has diminished power and a restricted prerogative in a colony—a position for which I venture to think no authority can be cited. And if this be the case, then whatever laws relating to the internal government of the realm of England he might make, with the advice and consent of the two Houses of Parliament, he might make in a colony for the purpose of regulating its internal affairs, with the advice and consent of the people of that colony through their representatives, and, among others, laws for establishing Courts of Judicature.

I have thus stated what appears to be the rule of the Common Law and the uniform practice of Colonial Legislatures upon the subject,

because, if my conclusions are correct, they will not only show that the Royal prerogative is in no way affected by holding that Colonial Legislatures, of which the Crown by its representative is an essential part, have power to make laws for the constitution of Courts, such laws being subject to disallowance by the Crown, but will also afford us some help in construing the particular clause upon which the objection is founded. But before proceeding to examine the Act from which the Legislature of South Australia derives its authority, it may be well to review the course of Imperial legislation in those cases in which Parliament has conferred powers to make laws for the peace, welfare, or peace, order, and good government of any place, and examine what construction these words have received in practice or otherwise. The first Act of the kind, as far as I am aware, is the Quebec Act, 14 Geo. III., cap. 83. This Act differs in one respect from all subsequent Acts. Instead of authorizing the Governor, with the advice and consent of the Legislature, to make laws, it authorizes the Legislature to make laws, with the assent of the Governor, for the peace, welfare, and good government of the colony. And it contains a proviso that nothing therein contained should extend to hinder His Majesty from creating, constituting, or appointing such Courts of civil, criminal, and ecclesiastical jurisdiction as His Majesty shall think necessary. Although, however, the prerogative of the Crown was thus expressly saved, the Legislature appointed by that Act passed an Ordinance establishing a Court of Appeal, composed of the Governor and Council of the province. And the Act 31 Geo. III., cap. 31, reciting that such Court of Appeal had been established, proceeds to establish a Court of Appeal similarly constituted for the separated provinces, and gives the right of appeal in the like cases and in the like manner and form, and subject to such appeal therefrom as might, before the passing of this Act, have been heard and determined by the Governor and Council of the province of Quebec, subject, however, to any other provision which might be made by the Legislature appointed by the said Act. It appears to me that there could scarcely be a more emphatic legislative recognition that the power to make laws for the peace, order, and good government of the colony included the power to make laws for the establishment of Courts of Judicature, and that the exercise of that power did not affect the Royal prerogative. The next Act in order of time was the Act just referred to—the 31st Geo. III., cap. 31, which authorizes the division of the province of Quebec into separate provinces,

and the appointment in each province of a Legislature composed of a Council to be nominated by the Crown and a House of Assembly to be elected by the people; and provides that His Majesty, with the advice and consent of such Legislature, shall have power "to make laws for the peace, welfare, and good government" of the respective colonies; and which Act remained in force for nearly fifty years. Under this Act the Legislature of Upper Canada, in, I believe, the first year of its existence —certainly during its first session—passed an Act establishing Courts of King's Bench and Common Pleas, which received the Royal Assent, and subsequently, among others, established Division Courts, answering to our Local Courts, a Court of Chancery, and a Court of Appeal. And the Act 3rd and 4th Vict., cap. 35, which repealed those parts of the 3rd Geo. III., cap. 31, that provided for the separation of the colonies and the establishment of separate Legislatures, again recognised the principle that the power to make laws for the peace, welfare, and good government of a country included the power to make laws for the constitution of Courts, since it provides that "all the Courts, civil and criminal," within the provinces of Upper and Lower Canada, except so far as they may be abolished, altered, or varied by that Act, or by Acts of the Legislature it constitutes, shall continue and subsist "in the same form and with the same effect as if this Act had not been made"—thus leaving them to rest upon the sole authority of the Colonial Acts under which they were originally constituted. The last-named Act of the 3rd and 4th Vict. contains the same words, power "to make laws for the peace, welfare, and good government," and under this power the Legislature has made laws for the purpose of improving its judicial system, by establishing new Courts and altering the constitution of existing Courts, all of which have received the assent of the Crown, and have been left to their operation. And the construction put upon these Acts, both by the Imperial Parliament and the successive Legislatures which they have established, is the more important, because it will seem on examination that they have respectively formed the models upon which the Acts of the 9th Geo. IV., cap. 83, the 5th and 6th Vict., cap. 61, and the 13th and 14th Vict., cap. 59, have been framed. Leaving out of consideration for the moment the Acts relating to New South Wales and Van Diemen's Land, I pass on to three Acts, the language of which is, so far as regards this question, substantially identical. The 10th Geo. IV., cap. 22, providing for the government of Western Australia; the 4th and 5th

Geo. IV., cap. 35, providing for the establishment of this colony; and the 7th and 8th Vict., cap. 13, providing for "the Government of the settlements on the Coast of Africa and in the Falkland Islands." These Acts contain no provision for the establishment of a separate legislative body. They empower the Crown to make, or by Orders in Council to empower one or more person or persons to make laws for the peace, welfare, and good government of the place, to constitute Courts, and to appoint officers. The phraseology of the Acts is significant. They do not confer upon the Crown any power but that of making laws, which power it did not possess, leaving the power of constituting Courts and of appointing officers to be exercised by the Crown by virtue of its prerogative; but they in effect provide that, if the power conferred is delegated by the Crown, the same person or persons who make the laws shall also constitute Courts and appoint officers. In fact, they provide for the appointment, not of a Governor and Legislature, but of a Council of Government. I have not been able to find a copy of the Orders in Council issued in pursuance of the Act 4th and 5th Wm. IV., cap. 95; but I have reason to believe that they were, so far as this point is concerned, the same as those issued under the corresponding section of the Swan River Act; and those assume that the power to constitute Courts was included in the power to make laws, since they provide that Courts shall be established by means of laws, and not in any other manner.—(Clark's Col. Law, p. 672). The next Act to which I refer is the Act 3rd Vict., cap. 62. This Act authorizes Her Majesty to separate from the colony of New South Wales any islands which formed a part of it, and to erect the portion so separated in one or more colonies, and to establish in such colony or colonies a Legislative Council, consisting of not less than seven persons besides the Governor, and provides that such Legislative Council should have power to make laws for the peace, welfare, and good government of the colony. Under this Act the colony of New Zealand was established, and among the first laws passed by the Legislature of that colony was an Ordinance constituting a Supreme Court, which was assented to by the Governor in the name and on behalf of Her Majesty, and subsequently confirmed by the Crown. This Act of the 3rd and 4th Vict., cap. 62, was followed by the 9th and 10th Vict., cap. 103, which authorize the Crown to divide the colony into separate provinces, and to constitute in each province a Legislature, consisting of the Governor, a Legislative Council, and House of Representatives; and the Legislatures so to be

appointed are empowered to make laws for the peace, order, and good government of the respective provinces. This Act also authorizes the Crown to constitute a General Assembly for the whole colony; and it is noticeable that the only power to appoint a Court conferred by the Act is conferred upon this General Assembly, which does not possess power to make laws for the peace, order, and good government of the colony, and that power only extends to the constitution of a Supreme Court of Original Jurisdiction, and which shall be a Court of Appeal from the Supreme Courts of the separate provinces, and a General Court of Insolvency. The establishment of the separate Supreme Courts is, however, left to the separate Legislatures under the general power to make laws empowered by the Act, under which, in fact, they have been constituted. There is, then, the Act 5th and 6th Vict., cap. 61, to provide for the better government of South Australia, which provides for the establishment of a Legislative Council, consisting of not less than seven persons exclusive of the Governor, who should have power to make laws for the peace, order, and good government of the colony. And there is also the Act which authorizes the Crown to establish a Legislature within the island of Newfoundland, under which a Charter was issued constituting a Legislature, consisting of a Governor, Council, and House of Assembly, which by its Charter is authorized to make laws for the peace, order, and good government of the colony. The Acts to which I have thus referred are, so far as I have been able to ascertain, all the Acts of Parliament providing for the establishment of Legislatures, or the concession of legislative powers to persons within colonies, with the exception of those relating to New South Wales, prior to the passing of the 13th and 14th Vict., cap. 59. In none of these Acts, where a Legislature, properly so called, is established, is any power given to constitute Courts; but in every case, without exception, the Legislatures thus established have passed laws for the purpose of constituting Courts. In some cases these laws have been recognised as valid by Parliament; and in all cases they have been assented to in the name and on behalf of the Crown, and have been subsequently confirmed or left to their operation by the Sovereign under the advice of the law officers of the Crown in the colonies and in England. And the language used in these Acts is substantially the same with that previously used in the Royal Commissions under which Legislatures had been constituted in the older colonies, and which had always been assumed to include the power to make laws for the constituting of

Courts. I confess that when it is conceded that this power is necessary for peace, order, and good government, and when I find that these words have always been so construed in practice as to include it, I feel that it requires some very forcible argument to convince me that the construction contended for on the part of the defendants is correct. And this feeling is strengthened by the consideration that if it is correct, not merely is this colony deprived of powers which it originally possessed, but Western Australia also, if it availed itself of the provisions of the 13th and 14th Victoria, would be subject to a similar deprivation; and that, in fact, it could only purchase its political enfranchisement at the price of surrendering the power of remodelling, or enlarging, or amending its judicial system; and this while all the petty settlements upon the coast of Africa and the Falkland Islands still continue to enjoy that privilege.

I, however, proceed to examine the argument upon which the defendants rely. It may, I believe, be thus stated:—The Act constituting the colony (4th and 5th Wm. IV., cap. 95), empowers the King to authorize one or more persons to make such laws and to constitute such Courts as may be necessary for the peace, order, and good government of the colony; and this language is substantially followed by the amending Act of the 1st and 2nd Vict., cap. 60:—but the Act 5th and 6th Vict., cap. 61, which repeals these two Acts, gives no other power to the Legislature, whose establishment it authorizes, than the power to make laws for the peace, order, and good government of the colony—a change of phraseology which must imply an intention on the part of Parliament to withdraw the power to constitute Courts which had been previously conferred:—and this inference is corroborated or rather absolutely established by the language of the 13th and 14th Vict., cap. 59, which, although it confers upon the Governors of the respective colonies of Victoria and Van Diemen's Land, with the advice and consent of their Legislative Councils, power to make laws for the peace, welfare, and good government of the said colonies respectively, nevertheless feels it necessary, by section 29, to confer upon these Legislatures, as well as upon the Legislature of New South Wales (to whom the same power of making laws for the peace, welfare, and good government of the colony had been given by the Act 5th and 6th Vict., cap. 76), but excluding South Australia, powers "to make provision as to them should seem meet for the better administration of justice, and for defining the

constitution of Courts of Law and Equity and of Juries within the said colonies;" and this implies an opinion on the part of the framers of the Act, or rather amounts to a legislative recognition that the power to make laws for the peace, welfare, and good government of a colony does not include the power to provide for the better administration of justice or to define the constitution of Courts and Juries. I believe I have not in this statement omitted any material portion of the argument. But before proceeding to estimate its worth we may pause for a moment to consider its consequences. They are somewhat startling. Every Act passed since June, 1843, for the purpose of establishing Courts of Justice, or of making provision for the better administration of justice, or for defining the constitution of Courts or of Juries, is invalid. It will not, I presume, be disputed, as was pointed out by the Attorney-General, that the Ordinance No. 12 of 1849, which provides that for the future the Supreme Court should be holden by or before one or more Judges to be appointed by Her Majesty instead of before one Judge, as previously enacted, and under authority of which my learned colleague Mr. Justice Boothby was appointed, was an Act making provision for the better administration of justice, or for defining the constitution of a Court of Law, any more than it will that the Third Judge and District Courts Act, under which my learned colleague Mr. Justice Gwynne was appointed, was passed for the same purpose. It would follow that both of these Acts are invalid, and that this Court is only rightfully held before one Judge. In the same manner the Ordinance regulating summary proceedings before Justices of the Peace, the Act constituting the Insolvent Court, the Acts which now regulate the constitution of Juries, the Acts regulating the practice and procedure of this Court, the Divorce and Matrimonial Causes Act, are, as well as the Local Courts Act, and for the same reasons invalid. It is not necessary to refer to the still wider consequences that would flow from holding this argument to be valid. Enough has been stated to show the importance of the consequences involved in the question which we have now to decide. It is, I think, somewhat singular that the Imperial Parliament should have deliberately deprived South Australia, under the pretence of providing for its better government, of the power which it had previously possessed of creating Courts of Justice, and thus of adopting its judicial system to the changing circumstances of a rapidly increasing community; and this is the more singular, inasmuch as the same Act provides for the future esta-

blishment in this colony by the Royal prerogative of representative institutions, analogous to those which we now possess, and gives to the Legislature so authorized to be established precisely the same powers, and no others, as those conferred upon the nominee Council which it establishes: so that it provides for the permanent existence in South Australia of Legislatures, which though in words empowered to make laws for the peace, order, and good government of the colony, would be nevertheless deprived of the power of erecting Courts, or making provision for the better administration of justice, leaving all these to be provided for by the authority of the Imperial Parliament. I must confess that this appears to me to raise a very strong presumption against the construction now contended for. And I confess, also, notwithstanding the low estimate of the opinion of the law officers of the Crown in England, which has occasionally been expressed in this Court, I cannot but feel that some further presumption arises against that construction, from the circumstance that now, during more than twenty years, the Legislatures established in this colony have passed laws for the various purposes which it is thus contended are beyond their powers, and yet that none of the eminent men who have during that time been called upon to advise the Crown with reference to these laws have ever suggested any doubt as to their validity. I admit that I shrink from a conclusion which appears to contribute so much incompetency or carelessness to such men.

I admit, however, that these are only presumptions, and that the question must be decided by a consideration of the 13th and 14th Vict., cap. 59, and of the other Acts, *in pari materia*, so far as they throw any light upon its construction. And although, for reasons to be hereafter assigned, I do not conceive that the Acts 4th and 5th Wm. IV., cap. 95, 1st and 2nd Vict., cap. 60, and 5th and 6th Vict., cap. 61, have any bearing upon the decision of this question; yet in order that I may not pass over any of the arguments which have been urged in support of the construction contended for on the part of the defendants, I will consider the language of those Acts, and examine how far they tend to give any support to that construction. It is sufficient for this purpose to contrast the language of the 4th and 5th Wm. IV., cap. 95, and the 5th and 6th Vict., cap. 61, for the 1st and 2nd Vict. does not substantially differ from first-named Act. I will quote the language so far as relates to this subject in full. It is as follows:—"It

shall and may be lawful for His Majesty, his heirs and successors, by any order or orders to be by him or them made, with the advice of his or their Privy Council, to make, ordain, and subject to such conditions or restrictions as to him or them shall seem meet, to authorize and empower any one or more person or persons resident and being within any one of the said provinces to make, ordain, and establish all such laws, institutions, or ordinances, and to constitute such Courts, and to appoint such officers, and also such chaplains of the Established Church of England and Scotland, and to impose and levy such rates, duties, and taxes, as may be necessary for the peace, order, and good government of His Majesty's subjects, and others within the said province or provinces." The Act of the 5th and 6th Vict., cap. 6, provides "that it shall be lawful for Her Majesty to constitute within the said colony a Legislative Council, consisting of the Governor and of seven other persons at the least, which Legislative Council shall have power to make laws for the peace, order, and good government of the said colony." Now, it is contended that this change in the language of the last Act, as compared with that of the two former, shows a corresponding change in the intention of the Legislature. And I should be disposed to concede this in reference to the present question, though I should wish to guard myself against being supposed to concur in the universal application of such a principle of construction. In fact, to adopt it would be almost to render impossible any simplification or shortening of the phraseology of Acts of Parliament, since this is, for the most part, attempted by leaving out whatever in the language or provision of former Acts had appeared superfluous or redundant; and a signal instance of this appears to me to be furnished by the very Act 5th and 6th Vict., cap. 61. In the former Acts which it repeals express power had been given to "impose and levy rates, duties, and taxes;" but this power is not given by the 5th and 6th Vict., nor, in fact, so far at least as internal taxation is concerned, by the 13th and 14th Vict., cap. 59. And yet I doubt if any one would seriously argue that a power to make laws for the raising of taxes was not implied in the power to make laws for the peace, welfare, and good government of the colouy. At any rate I am afraid that without this power it would be of little use to attempt to administer the government, or to make provision for the administration of justice. I have, however, said that in reference to the present question it appears to me that the alteration in the language of the Legislature does indicate a correspond-

ing alteration in their intentions. But what is that alteration? There is no alteration whatever in the language employed in the various Acts for the purpose of describing the powers of legislation which they respectively confer. The Acts of 3rd and 4th Wm. IV., and of 1st and 2nd Vict., authorize the making of "such laws, institutions, and ordinances as may be necessary for the peace, order, and good government" of His Majesty's subjects, &c.; and this language is substantially repeated by the Act of 5th and 6th Victoria. But in addition to the power to make laws, not as a part of that power, the former Acts give a power to constitute Courts. Now, as by the Common Law of England there are only two modes applicable to a colony by which Courts can be created—by legislation and by letters patent—(C. Litt., 260a, 3 Blackstone, 24)—it would seem that the power to constitute Courts expressly conferred by the two first Acts, if not included in the power to make laws, should have been exercised by letters patent under the public seal of the colony (C. Chal., p. 240.) And on this account it appears to me that if the arguments now relied upon are valid, there is very great doubt, at the least, whether any Courts whatever have been properly constituted; since the Courts professed to be constituted under authority of the 4th and 5th of Wm. IV., and 1st and 2nd of Vict., have been constituted, not by letters patent issued under the power to constitute Courts, but by ordinances passed under the power to make laws. This is, however, immaterial to the particular question, though it might become important hereafter. The material point is that the Act of 5th and 6th Vict., cap. 61, in omitting to confer the express power to constitute Courts, omits a power which was not included in, but was given in addition to the power to make laws, and was that power which the Crown could exercise by its prerogative, apart from legislation;—which it had been customary to delegate by commission to some authority within a colony at its first establishment, and the delegation of which had never been held to limit or derogate from the power to make laws for the same purpose. It appears, therefore, to me that as the same language is employed in the three first Acts relating to the Government of South Australia to describe the legislative powers which they severally confer, that language must receive the same construction in all, so that either the first Legislature had not, or the second Legislature had power to make laws for establishing Courts; and that the withdrawal of the separate power to constitute Courts by the last Act, so far as it warrants any inference,

would only show that in the opinion of Parliament its further continuance was unnecessary, the ordinary powers of legislation sufficing for the purpose.

It is, however, obvious that the present question depends solely upon the construction to be given to the 14th section of the Act of 13th and 14th Vict.; and it would seem equally obvious that in construing that Act we must refer, not to the prior Acts relating to South Australia, with which it has no connection excepting to repeal them, but to the prior Acts relating to New South Wales and Van Diemen's Land, the 9th Geo. IV., cap. 83, the 2nd and 3rd Vict., cap. 70, and the 5th and 6th Vict., cap. 76, upon which last the Act of the 13th and 14th Vict. is founded, and with all of which it is directly connected. The first of the series is the Act 9th Geo. IV., cap. 83, entitled "An Act to provide for the better Administration of Justice in New South Wales and Van Diemen's Land, and for the better Government thereof, and for other purposes relating thereto." That Act authorizes the Sovereign, by Charter or Letters Patent, to erect and establish Courts of Judicature in New South Wales and Van Diemen's Land; defines the power and jurisdiction of such Courts; regulates their proceedings; empowers the Sovereign to establish Circuit Courts by Charter or Letters Patent, or by Orders in Council; and to authorize the Governors of the two colonies respectively to convene Courts in penal settlements; and having thus provided in all necessary details for the administration of justice by means of a Supreme Court, it authorizes the appointment of Courts of Quarter Sessions and of Requests by the Governors, with the advice and consent of their respective Legislative Councils. It then recites, "That it may be necessary to make laws and ordinances for the welfare and good government of the said colonies of New South Wales and Van Diemen's Land, and the dependencies thereof, the occasion of which cannot be foreseen, nor without much delay and inconvenience be provided for, without entrusting that authority for a certain time and under proper restrictions to persons resident there." And it then provides for the establishment of a Legislative Council, with whose advice and consent the Governors shall have power "to make laws for the peace, welfare, and good government of the said colonies respectively, such laws and ordinances not being repugnant to this Act, or to any charter or letters patent, or Orders in Council which may be issued in pursuance thereof, or to the law of England." I have stated thus fully the character of the

provisions of this Act, and its language in reference to the object and extent of the legislative powers conferred, for the purpose of showing, not merely that it was the expressed intention of the Legislature to confer limited and temporary powers, but also that in its opinion the power to make laws for the peace, welfare, and good government of the colony included the power to make laws for the constituting of Courts and the better administration of justice, since otherwise the words "not being repugnant to this Act, or to any charter or letters patent, or Order in Council which may be issued in pursuance thereof," would be insensible. And further that, so long as the Act 9 Geo. IV., cap. 83, continued in force, the Legislatures of the respective colonies of New South Wales and Van Diemen's Land would have no power to constitute Courts, or make any provision whatever for the better administration of justice. And this latter conclusion is expressly declared to be the fact by the Act 2nd and 3rd Vict., cap. 70, which recites that the provisions of the Act 9 Geo. IV., cap. 83, for establishing Courts of Justice in New South Wales and Van Diemen's Land, "have by reason of the extension of the said colonies been found in divers respects inapplicable to the circumstances of the said colonies, and to the wants of the inhabitants thereof; but the local Legislatures of the said respective colonies established under the said recited Act have no power to repeal or alter any of the before-mentioned provisions thereof." And it then gives to such Legislatures the same powers precisely of making provisions for the better administration of justice, &c., as are conferred by the 29th sec. of the Act 13th and 14th Vict., cap. 59, upon the Legislatures of New South Wales, Victoria, and Van Diemen's Land. In fact, the enacting part of the latter section is copied substantially from the Act 2nd and 3rd Vict. And as the Act 9th Geo. IV., cap. 83, has never been repealed, and the power of making provision for the better administration of justice, &c., notwithstanding that Act, given to the Local Legislatures by the 2nd and 3rd Vict., cap. 70, were apparently confined to the Legislatures then existing, and the Act 13th and 14th Vict., in the 28th clause, which authorizes Her Majesty, by Letters Patent under the Great Seal, to constitute a Court within the colony of Victoria, to be called the Supreme Court of the Colony of Victoria, renders the provisions of the 9th Geo. IV., cap. 83, applicable to such Court, and provides for their continuance until varied, there was a ground for the introduction of the 29th clause, so far as the colonies enumerated in it are concerned, altogether indepen-

dent of any presumed limitation or inadequacy of the powers conferred by the 14th section, as though these did not of themselves, and apart from any restraining provision, confer a power of making a provision for the better administration of justice, &c. And this is made yet more clear, if possible, by the last clause of the section—"Anything in the said recited Act, &c., to the contrary notwithstanding," which governs the language of the entire section. It appears to me, therefore, to violate every rule of construction to infer from a provision thus necessitated and qualified any intention to exclude the Legislature of South Australia from the powers which it confers, or to deprive the Legislature of Western Australia of the similar powers which it has always possessed. On the contrary, its obvious, and, as it seems to me, its only object was to remove from the older Australian Colonies a disability to which, owing to the peculiar character of their early history, they had been for a time subjected, but from which this colony had always been free. It appears to me hardly necessary to pursue this subject further. I may, however, refer to the 25th section of the 13th and 14th Vict., No. 95, which, while providing, as was necessary, for the continuance of all laws or the ordinances in force in South Australian at the time, including all the laws passed before 1843, expressly makes them, without any exception, subject to the power of the Governor and Legislative Council to repeal or vary them. And also to the recognized principle that an affirmative Statute does not take away the Common Law (Bac. Ab., Statute G.), and that consequently the affirmative words in the 14th section, with which alone we have to do, would not affect the power which the Crown possesses of making laws for the establishment of Courts, with the consent of the people by their representatives.

It is scarcely necessary even to refer to the argument that if the power to make laws for the peace, order, and good government of a colony includes a power to make laws for the establishment of Courts of Justice, the power conferred upon Corporations in England to make By-laws for analogous purposes must be held to include the same power; for apart from all general considerations the case of Kirke v. Neville, cited by the Attorney-General, shows that there is a marked distinction recognized by the law between laws and by-laws, the latter being restricted to certain purposes and confined within definite limits, which certainly never yet have been supposed to apply to laws made by a Legislature whose Acts "have the same effect within a colony as Acts of

Parliament in England" (Cha. op. p. 351), and which is described as supreme within the colony (Kelly v. Carson 10, Moore P.C.R.).

I have thus, with what may be regarded as unnecessary minuteness, but which I have felt to be requisite under the circumstances that the majority of the Court have formed a contrary opinion, stated the grounds upon which my judgment is founded. I may at least say that I have spared no research in order to enable me to arrive at a correct conclusion; and the result of my examination has been to convince me that there is not a single aspect under which the argument on the part of the defendant possesses any weight whatever. Stated generally, it had at first an appearance of strength, which a closer investigation has dispelled. With all respect, therefore, for my learned colleagues, and fully conceding that the mistake may after all be mine, I can have no hesitation whatever in holding that the power to make laws and establish Courts is possessed by the Legislature of South Australia.

Rule absolute.

DECEMBER 21, 1865.

COPELAND v. WENTZEL.

ACTION for negligence, in setting in motion a saw mill without notice to plaintiff, whereby plaintiff's hands and arms were cut and permanently injured. Plea—Not guilty. Defendant gave evidence that the saw was connected with the machinery by a shifting belt; that it was plaintiff's duty, when the machinery was stopped, to disconnect the saw by shifting the belt on to the loose pulley, which would have prevented the saw from moving when the machinery was again set in motion. The Judge, on conclusion of defendant's case, held that there was no evidence to go to the Jury, and directed the plaintiff to be called. Plaintiff by his counsel appeared, and objected that he could not be nonsuited against his consent. The Judge overruled the objection. Held, on motion to set aside nonsuit, that the Judge was right.

THE declaration stated that the defendant so negligently and improperly, and without due notice, set in motion a certain saw-mill, near the machinery of which the plaintiff was lawfully standing in the course of his daily labour, as servant to the defendant. That circular-saw of the said mill was driven and struck against the plaintiff, whereby the hands

and arms of the plaintiff were much cut, and he was permanently injured and crippled. Plea—not guilty.

The evidence on behalf of the plaintiff was that he was employed by the defendant as a sawyer; that his duty was to superintend the cutting of deal planks to a certain width by means of a circular-saw, which was, with other machinery on the premises, driven by a steam-engine situated at some distance from the shed where plaintiff was employed. On the occasion in question the defendant had stopped the engine to examine it, when the motion of the saw ceased. The plaintiff, wishing to ascertain if the distance between the fence and the saw was correct, reached his arms over, one on each side of the saw; that whilst in that position, occupied in measuring the distance, the engine, without any notice to him, was set in motion; the saw revolved, and he immediately found that his hands were cut. He was taken to the Hospital, where one finger of his right hand was amputated; another finger was subsequently taken off, and the use of the hand became permanently destroyed. He admitted that there was a shifting belt, by moving which the saw might be disconnected with the machinery, and that it was customary, but not imperative, so to disconnect it when the engine was stopped, and also before measuring a cut. The evidence for the defendant was to the effect that plaintiff was not at the saw table when the engine was set in motion; and stated more fully that the circular-saw was set in motion by a band running over a fast pulley attached to the machinery; there was another pulley (a loose one), and the band could be thrown off the fast pulley on to the loose pulley, which would have the effect of stopping the saw; that it was the duty of the plaintiff to have done so before he attempted to measure the width of the cut; and that if he had adopted that precaution the injury would not have occurred, for the saw could not have been set in motion.

The cause was tried before Mr. Justice Boothby, on the 23rd November, who, upon the close of the defendant's case, said there was no evidence to go to the Jury, the plaintiff having, by his own negligence, contributed to the injury, and directed the plaintiff to be called. *Mr. Stow, Q.C.*, plaintiff's counsel, said he appeared for the plaintiff, and he declined to be nonsuited. He submitted that there was evidence to go to the Jury. The objection was overruled, and the learned Judge directed a nonsuit to be entered, but offered to receive a bill of exceptions. Plaintiff's counsel declined the offer.

On the 27th November a rule *nisi* was granted to set aside the nonsuit, on the grounds—1st. That the learned Judge who tried the cause directed a nonsuit, although plaintiff appeared and objected to be nonsuited. 2nd. That plaintiff was nonsuited after defendant's case had been closed. 3rd. That there was evidence to go to the Jury to support plaintiff's case. On the 12th December the rule came on to be argued, when *Mr. Andrews, Q.C.*, showed cause. Upon the first point, the nonsuit was in the discretion of the Judge; he may nonsuit without the consent of the plaintiff (Edwards v. Evans, 3 East. 451; Doe v. Tyler, 6 Bing. 561). As to the second point, the balance of evidence was so greatly in favour of the defendant, that the Judge was right in telling the Jury there was no case to be submitted to them (Holden v. Liverpool Gas Company, 3 Com. Bench, p. 1).

Stow, Q.C., replied. The Judge had no power to nonsuit against the plaintiff's consent (Strother v. Hutchinson, 4 Bing., N.C., p. 83; Cossar v. Reid, 17-2 B., 540; Alexander v. Barker, 2 Crompton and J., 133). As to the third point, that there was evidence to go to the Jury. The witnesses called by the plaintiff, in reply, proved that the custom was that, before the engine was started, notice should be given to every person who would be affected by the machinery being set in motion. However slight the evidence was, the plaintiff had a right to have it submitted to the Jury (Flower v. Adam, 2 Taunt., 313; Williams v. Holland, 10 Bing., 112.

Cur. adv. vult.

GWYNNE, J., now delivered the judgment of the Court. In this case the plaintiff brought an action against the defendant Wentzel for damages for an injury that the plaintiff had sustained through the alleged negligence of the defendant. Upon the trial my learned colleague Mr. Justice Boothby, not thinking there was any case to go to the Jury, nonsuited the plaintiff. The plaintiff not wishing to be nonsuited, when called upon appeared, and contended through his counsel, *Mr. Stow*, that he had a right to go to the Jury, and that he could not be nonsuited without his consent. But, however, the learned Judge offered *Mr. Stow* the right of tendering a bill of exceptions upon points of law, but persisted in his right to nonsuit, notwithstanding that the plaintiff was present. The present rule was granted upon two grounds, the first simply being

that the nonsuit was without plaintiff's consent. *Mr. Stow* objected, and this was brought forward as a ground *per se* entitling the plaintiff to a new trial. The second ground was that the law as laid down by my learned colleague was erroneous. Taking the last point first—whether or not the ground of nonsuit was good in law, I may say that the Court were of the unanimous opinion, from the report which it had of the case, that the nonsuit was right, the plaintiff having contributed to his own injury. It would appear that the saw was connected with the engine by means of a band, and that there was a lose and fast pulley, and that a person could shift the band on to the lose pulley, and by that means could ensure absolute safety if the plaintiff had taken that precaution; and it seems to me a precaution which any person exercising ordinary care for his own safety would have taken, because whilst the saw was connected with the engine it might be set in motion not only designedly, but by accident, and the plaintiff, by not taking this precaution, contributed by his own negligence to the accident. It was a well-established rule of law that where a plaintiff by not exercising ordinary care contributed to an accident by which he sustained an injury no action would lie to the other party (Holden v. the Liverpool Gas Company. With regard to the other point, it was contended, as I have already said, that because the plaintiff was nonsuited against his will, that that was such a miscarriage as alone to entitle the plaintiff, without regard to the merits, to a new trial. I would refer to the case of Sadler v. Evans, 4 Burrows, known as the Lady Windsor case. That was an action for money had and received to the plaintiffs use; and counsel, in opening the case for the plaintiff, stated that he intended to try the right of Lady Windsor to a quit rent of 1s., and another sum of 6d. for mises. It was stated that this sum was paid to the defendant Evans as the receiver of Lady Windsor, when in fact it was not due to her, and that it was therefore received without any good consideration. It was held by Baron Perrott that the action would not lie against the defendant, and that it ought to have been brought against Lady Windsor, and not her agent. The plaintiff refused to be nonsuited, and the Court above was applied to to set aside the nonsuit. It was contended, on the part of the defendant, that the right to nonsuit was altogether with the Judge who tried the cause, and that the nonsuit, although directed without consent, could not be set aside by the Court above; and as to that Lord Mansfield said "he had no apprehension that a nonsuit might not be set

aside upon proper and sufficient grounds properly supported, and they must be very strong cases that would alter his opinion about it." And although Baron Perrott acknowledged that he was the sole occasion of the nonsuit, and that it was against the opinion of the plaintiff's counsel, he candidly declared that it was his wish, if he was wrong in his opinion, that the nonsuit might be set aside. Yet it was only objected that the nonsuit having been ordered by the Judge at *Nisi Prius*, it was not competent for the Full Court to reverse his decision. The argument used in the present case, namely, that the Judge could not nonsuit against plaintiff's consent, was not so much as hinted at in Lady Windsor's case; and without going through the case at length, I would remark that the Court were unanimous, both upon principles and authorities, that where a Judge at *Nisi Prius* nonsuited the plaintiff, and is mistaken, the Court upon motion may set aside the nonsuit. In that case the rule to set aside the nonsuit was discharged. Although it was laid down in the text-books that a plaintiff could not be nonsuited against his consent, yet the meaning, I apprehend, is that if the plaintiff refused he could not be said to have consented, because if when called he appeared and objected to the Judge's law, he could tender a bill of exceptions, and take his case on to the Court of Error or to the Court from which the record proceeded and move it, on the ground that the Judge was mistaken upon a point of law. It was, therefore, true that a party could not, in a certain sense, be nonsuited against his will, because he could show that the judgment was erroneous. The Court were of opinion that the rule must be discharged.

Rule discharged, with costs.

NOVEMBER 13, 1865.

PATTEN v. PEARSON.

SLANDER—Action brought in Local Court, Woodside—The Plaint alleged that Defendant accused Plaintiff of forging the name of "John Pearson" to a Memorial to the Central Board of Education, that one — Henzell was unfit to hold the office of a Licensed Teacher. Verdict for Plaintiff. Held, on rule to set aside the verdict, that to charge such a forgery slander would lie.

THE plaint stated that under the Act No. 20 of 1851, entitled "The Central Board of Education," one Henzell was appointed a licensed teacher, and plaintiff averred that certain persons, including one "John Pearson, of Section 1801," forwarded a memorial to the Secretary of the Board of Education, that the said Henzell was not a fit and proper person to teach in a school. The plaint further stated that the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say—the wife of the defendant said to plaintiff, in the presence and hearing of the defendant, "You (meaning the plaintiff) signed Mr. Pearson's name to that memorial sent in to the Board of Education against Mr. Henzell." And the plaintiff then said, in the presence and hearing of the defendant, to his said wife, "Do you accuse me of forging Mr. Pearson's name" (meaning the said John Pearson, of Section 1801), and the defendant's wife said, "Yes, I do;" and the defendant, in continuation and affirmation of the words spoken by his said wife, said, "Yes, and had not Mr. Pearson (meaning the said John Pearson, of Section 1801), died so suddenly, I should have pulled you for it," meaning thereby that the plaintiff had unlawfully forged the name of the said John Pearson, of Section 1801, with intent fraudulently to deceive and impose on the said Central Board of Education. Plea—not guilty.

The cause was tried before the Special Magistrate and two Justices, and resulted in a verdict for the plaintiff.

The defendant obtained a rule to show cause why the verdict should not be set aside, and a new trial had, or a nonsuit entered, on the ground, amongst others, that the charge was one for which an action of slander would not lie.

Way now moved to make the rule absolute.

Ingleby, for plaintiff, showed cause. In this case the parties were interested in a country school, the master of which was in receipt of a Government stipend. A memorial was sent to the Education Board representing the schoolmaster as incompetent. Defendant and his wife accused plaintiff of forging Pearson's signature to the memorial. The cases of Reg. v. Moon, 4 Jur. N.S., confirming Reg. v. Patten, 18 Jur., 157, showing that it is forgery to sign a false certificate of character, which is the converse of the present case.

Way replied, and contended that both parties being interested in the school it was a privileged communication.

Cur. adv. vult.

FEBRUARY 13, 1866.

The CHIEF JUSTICE now delivered the judgment of the Court:—This was an action in a Local Court for slander, and the alleged slander was the imputation of forgery—the forging of the name of another person to a petition designed to procure the removal of a schoolmaster receiving pay from the Central Board of Education. A rule *nisi* was obtained to show cause why a new trial should not be had, or a nonsuit entered, on several grounds, which were all disposed of on the argument, except the point whether the charge was one in respect of which an action for slander would lie. On looking into the cases cited by Mr. Ingleby, we are of opinion that forgery such as this would be an offence for which a person might be convicted, and that therefore to charge such a forgery is slander for which an action will lie. The rule will, therefore, be discharged, with costs.

NOVEMBER 13, 1865.

PATTEN v. PHILLIPS.

PROHIBITION—Jurisdiction of Local Court—Validating Act—Cause set down for Trial—Before day of hearing decision of this Court was given in "Dawes v. Quarrell," that there were no legally constituted Local Courts, and the Special Magistrate did not hold a Court—Upon the arrival of the Imperial Act making Local Courts valid, the cause was set down by Defendant, and Plaintiff not appearing, judgment was given for Defendant. Held, that this was not a case for prohibition.

THIS was an action commenced in the Local Court of Kapunda. The defendant pleaded, and notice of trial was given. Before the day of trial, judgment had been given in Dawes v. Quarrell, which decided that there were no legally constituted Local Courts; and upon the authority of that decision the Special Magistrate refused to try the cause. The plaintiff then issued a writ out of the Supreme Court. Upon the proclamation in this Province of the Imperial Act, known as the Validating Act, the cause was set down by the defendant for trial at the next Court, and notice of trial served on plaintiff. On the day of hearing the plaintiff did not attend, and judgment was given for the defendant, with costs.

A rule *nisi* for prohibition having been obtained, to stay further proceedings *Way*, for plaintiff, moved to make the rule absolute.

Palmer, for defendant, showed cause. The Validating Act placed the parties in the same position as they were when the first notice of trial was given.

Way replied—The refusal of the Magistrate to try the cause in the first instance was the same as if the cause had been struck out, and the Magistrate had no jurisdiction to reinstate it.

Cur. adv. vult.

FEBRUARY 13, 1866.

The CHIEF JUSTICE delivered the judgment of the Court:—The cause of action arose prior to the decision of this Court in Dawes v. Quarrell, and the case was set down for trial at the next sitting of the Local

Court. Before that took place the decision of this Court in the above case was given, and the Special Magistrate, acting in accordance with the state of the law as then construed, did not hold a Court. After the receipt of what is termed the Validating Act the Court was held. The case was set down on the list, and notice was given to the person who had before acted as attorney for the opposite party. In the meantime the plaintiff had issued a writ from the Supreme Court, to which the defendant appeared; and as the plaintiff did not appear in the Local Court, the case was struck out, and he was ordered to pay costs. A rule for a prohibition was obtained, and the ground relied on was that the case having been once set down for trial, and not tried, although it had been adjourned, the Court became *functus officio*, and had no further power in the matter. We think, if from any circumstance whatever, a Local Court which is to be held at a certain time is not held, and nothing at all is done, this does not oust the jurisdiction, or compel all the parties who had initiated proceedings to commence *de novo*. We think, therefore, that this is not a case for a prohibition. We do not express any opinion as to the propriety of the conduct of the Special Magistrate in ordering costs, nor do we say that other remedies are not open to the plaintiff. We only say that this is a case in which a Special Magistrate had jurisdiction, and that a prohibition will not lie.

Rule discharged.

JUNE 26, 1866.

GULEY v. NEWPORT.

TRESPASS—Property Act No. 6, 1860 — *Plaintiff relied upon possession—Defendant proved that legal estate vested in him, but gave no evidence of possession—Verdict for Defendant upon plea of liberum tenementum—On motion to set aside verdict, on the ground that Defendant had not proved a right of entry within ten years—Rule refused.*

THE declaration stated that defendant broke and entered the close of the plaintiff, part of Section 1571, laid out as the Township of Durham,

and cut down and carried away the grass growing thereon. The defendant pleaded not guilty. Second, that the land was not the land of the plaintiff. Third, that at the time of the said trespass the land was the freehold of the defendant.

The cause was tried before Mr. Justice Gwynne on the 13th April, by consent without a Jury. The plaintiff relied upon possession. The defendant then proved his title from the Land Grant in 1842 to the conveyance to himself in 1865, but gave no evidence of possession by himself or those under whom he claimed. The plaintiff insisted that defendant must prove a right of entry within ten years, under local Act No. 6 of 1860, and not having done so he claimed verdict. The Judge directed a verdict for defendant.

GWYNNE, J., on the 6th June, delivered his judgment :—This was an action tried before me after the last Civil Sittings, without a Jury, by consent. The declaration was in the usual form of trespass, *quare clausum fregit*, and charged the defendant with taking a quantity of hay growing upon the *locus in quo*. The pleas were—first, not guilty; second, that the *locus in quo* was not the property of the plaintiff; and third, *liberum tenementum* in the defendant. Upon the trial the wife of the plaintiff, Mrs. Maria Guley, was called for the purpose of proving the trespass and the taking away of the hay, and also to prove that her husband took possession of the property in question about six years ago. However, she did not seem to have any clear recollection on the latter point, or any very distinct mental perception respecting it. She said, "It was not six years ago. I will not say it was not a year ago." At any rate, this was not important, as *Mr. Ingleby*, plaintiff's counsel, did not rest his case on the length of possession of the plaintiff, but the defect of proof on the part of the defendant. On defendant's behalf the inheritance in fee-simple was proved by a regular deduction of title from a land grant of the whole section, including the *locus in quo*, to Mr. Peter Hunter, dated July 19, 1842. The legal estate was traced from that period down to a conveyance to the defendant on the 4th October, 1865. The operation of this instrument was not disputed, nor was it disputed that it had the effect assigned to it of vesting the fee-simple in the defendant. But it was insisted that the defendant, on the plea of *liberum tenementum*, was bound to prove not only a right to the property,

but a right of entry within ten years; and the question is, had he to do so. Undoubtedly under that plea the defendant admits a possession in the plaintiff, and that he himself is *primâ facie* a wrongdoer; but at the same time he undertakes to prove a title which will obviate and do away with the presumption of title arising from possession in the plaintiff, and in my opinion he has done so. It appears to me that the plaintiff has only a possession good against a wrongdoer; and any rights arising from that as between himself and the defendant are completely obviated by the latter's title; and the same line of evidence which proved that the defendant was seised in fee showed that he had a right of entry. On the plea of *liberum tenementum*, then, the judgment will be for the defendant. On the first and second pleas, for the sake of costs, the judgment will be for the plaintiff, as the trespass, in fact, was proved, as well as a possession, which ordinarily would constitute a title in trespass.

Ingleby—I presume I shall be allowed to except to the judgment on the ground of misdirection.

GWYNNE, J.—Yes; and I give you leave to take that point before the Full Court.

JUNE 26, 1866.

Ingleby moved, pursuant to leave, for a rule calling upon the defendant to show cause why the verdict should not be entered for the plaintiff with nominal damages, or that a new trial be granted. The declaration set forth a trespass, by entering and cutting a quantity of grass. To this the defendant pleaded first, not guilty; secondly, that the plaintiff was not possessed; and thirdly, that at the time of the alleged trespass the freehold was his. The plaintiff gave evidence of the trespass, and the defendant gave evidence of a documentary title, but no evidence of possession by himself or any person through whom he claimed. In the case of McLean v. Wallis, which was an action of ejectment tried in this Court, it was held that a plaintiff in ejectment must not only prove his title, but the right of entry within ten years. In fact, a defendant relying upon a plea of *liberum tenementum* was in the same position as a plaintiff in ejectment—he must rely entirely upon the goodness of his

own title and right of entry, and not upon the weakness of the opposite party's case.

GWYNNE, J.—That plea admits the possession of the plaintiff, and that the defendant himself is *primâ facie* a wrongdoer.

The CHIEF JUSTICE—Yes. He admits that he has done what would constitute him a wrongdoer, unless he could justify it by proving his title.

GWYNNE, J.—Unless he could prove that the freehold was his own.

Ingleby—And of this he must give the same evidence as would be required from a plaintiff in ejectment. He must prove that he had the freehold in himself, and that he possessed a right of entry at the time of the alleged trespass—Lowe and Another v. Govett, 3 Barnewell and A., 863. That case was tried in 1833, one year before the Statute of Limitations. It was almost the only one bearing directly upon the subject, and it was quoted in "Petersdorf's Abridgment," p. 565. There was no reason why a defendant pleading *liberum tenementum* should be placed in a better position than a plaintiff in ejectment, simply by his own trespass, which was *primâ facie* a wrongful act.

GWYNNE, J.—What do you mean by a right of entry? I consider it a right of immediate possession; and surely if a man produces a title from the Crown to himself that is a right of entry or of immediate possession.

Ingleby—Suppose a case in which the defendant had been out of possession twenty years, and the plaintiff in possession only two years, the land having been held during the previous eighteen years by some third party under whom the plaintiff did not claim. The Statute would clearly have run for the whole twenty years against the defendant, which would prevent his claiming the land. Yet the plaintiff, if trespassed upon, could not establish ejectment, nor could he set up the possession of the third party against the trespasser. I can find no case in which documentary title alone was relied upon. But the very point was involved in the decision in the case of Nepean v. Doe, Smith's Leading Cases, vol.

2, p. 476, that a plaintiff in ejectment must prove a right of possession in himself within the prescribed time.

The CHIEF JUSTICE—The case of Nepean v. Doe showed that the defendant in the Court below had been in undisputed possession for nearly thirty years. It therefore became necessary for the plaintiff to show that his right of entry had accrued within twenty years, or he would be clearly barred.

Ingleby—The possession of several persons during twenty years would not enable either separately to establish a title (Dixon v. Gayson, and Fluker v. Gordon, both in 17 Bevan, 42). Two independent trespasses gave no title. There was a late case in which a man had been in possession for a series of years, and at his death his widow continued to hold till an entire term of twenty years was completed. After that the rightful owner obtained possession, and it was decided that though the widow had possessed a holding title she could not sustain ejectment. Jones v. Jones, 16 M. and W., 690, was to the same effect. The evidence to be given by a defendant in a plea of *liberum tenementum* did not differ from that which must be offered by a plaintiff in ejectment.

GWYNNE, J.—I ruled that you might give evidence to show that the defendant had been out of possession for ten years, but this you declined.

Rule refused.

MARCH 2, 1866.

IN EQUITY.

PAVY v. WHITE.

Partnership Account—Form of Claim under Act No. 14, 1853.

THIS was a claim for a partnership account. Pavy entered into partnership with the defendant from 12th December, 1861, to 12th December, 1864, under a verbal agreement that, after payment of rent of mill (£1,000), and £500 for interest on cash advanced to the firm by the defendant White, and for the goodwill of the business, the profits should be equally divided. By a statement of accounts a sum of money appeared due to the plaintiff, which the defendant denied.

Belt, for the plaintiff, moved for a decree for account between the partners, to be taken by the Master.

Stow, Q.C. (*Daly* with him), for defendant. This claim was filed under Act No. 14 of 1853. There is no endorsement by a Judge in this case allowing the claim to be filed, and the form of claim given by the schedule to the Act is not adopted in this suit. The terms of the partnership are set forth in this claim, and the form does not require them to be stated. Should a decree be made on this form of claim, the defendant will be debarred from objecting to the terms of the partnership, which are denied by the defendant's affidavit. The form given in the schedule merely orders "that the accounts be taken by the Master," and we object to any other order. The question of the terms of the partnership is for the Court to decide, and not for the Master. This claim ought to be dismissed, or amended by the plaintiff.

GWYNNE, J.—A still stronger argument is, that the object and genius of the Act is to shorten Equity proceedings, and if the forms of the Act are departed from as in this case, where will it end?

BOOTHBY, J., concurred.

Belt—Clause 16 of the Act referred to has not the application given to it by the counsel on the other side. This is simply a question of accounts, and the decree will be made in that form.

GWYNNE, J.—Modern conciseness is more useful than the verboseness of ancient times.

Belt—The form of claim is in effect the same as that given by the schedule. The defendant cannot be embarrassed.

Stow, Q.C.—It is irrelevant matter to introduce the terms of the partnership, and the defendant must be embarrassed.

The COURT—The claim must be amended by striking out the terms of the partnership, and by inserting instead that the partnership was "without articles." Costs of defendant to be paid by plaintiff.

The cause to be referred to the Master to take the accounts in the usual way.

MARCH 9, 1866.

In Re WILLIAM BECK, DECEASED.—*Exparte* HAMBRIDGE AND OTHERS.

Trustee Act No. 7, 1865-6—*Appointment of New Trustees.—The Will contained no power for the appointment of New Trustees.*

THIS was a petition of Sarah Hambridge, wife of John Hambridge (formerly the wife of William Beck, deceased), Rebecca Beck, Sarah Beck, and Ellen Beck, infants, stating that the testator, by his will dated 4th September, 1850, gave, devised, and bequeathed to the Rev. Michael Ryan and Thomas Taylor, their heirs, executors, and administrators, all his real and personal estate upon certain trusts in the said will mentioned; that the Rev. Michael Ryan was dead; and that

the other trustee, Thomas Taylor, being in failing health, was desirous of being discharged from the trusts of the will; but the will contained no power for the appointment of new trustees—prayed that Henry Hughes and Courtnay Cook might be appointed trustees of the real and personal estate, and guardians of the infants, subject to the trusts of the will, and that the said real and personal estate might vest in such new trustees.

The *Attorney-General (Mr. Boucaut)* appeared in support of the prayer of the petition, but he had not the consent of the surviving trustee to the new trustees.

GWYNNE, J.—Could not the continuing trustee appoint new trustees under Act No. 7 of 1862, sec. 25?

The *Attorney-General*—The will was made before that Act, and its provisions are not retrospective.

The CHIEF JUSTICE—Referring to the first few clauses of the Act, it seems to be the intention that it should be retrospective.

The *Attorney-General*—The Act No. 7 of 1855-6 gives this Court power to appoint new trustees if "it shall be found inexpedient, difficult, or impracticable to appoint new trustees without the assistance of the Supreme Court." It is inexpedient in this case to do without the assistance of this Court, as questions of title under this will may be involved.

GWYNNE, J.—Under this will it appears that the trusteeship was confidence placed in the two persons appointed by the will, no mention being made of their representatives or assigns; and, therefore, when one dies, the trust is at an end, and it might be doubtful whether the surviving trustee could appoint another in the stead of the deceased trustee.

The COURT made an order that the proposed new trustees be appointed, and the trust property vested in them, under secs. 21 and 23 of Act No. 7 of 1855-6, the continuing trustees's consent to be filed before the order was drawn up.

April 10, 1866.

Read *against* Tidemann.

LIEN—Action of Detinue in Local Court to recover certain Plaint Notes taken out by Defendant, a land agent, against various Debtors of Plaintiff. Pleas—general issue and a lien upon the plaint notes for fees paid and for commission. The Court below gave judgment for Defendant, upon the plea of lien. On motion to set aside that judgment, Held that lien did not exist.

In this case the plaintiff employed the defendant, who was a land and general agent, to collect certain of his debts, at a commission of 1s. in the pound. With a view of enforcing payment, the defendant took out nineteen summonses; but a difference arising between him and his principal, the plaint notes were demanded of him. On his refusal to give them up, the plaintiff brought an action for their recovery, with £100 damages for their detention. The pleas were appearance, and a claim upon the plaint notes as a lien for fees paid by the defendant, and for commission. The defendant tendered the amount of money paid by the plaintiff. The Court below held that such lien existed beyond the amount tendered by the plaintiff; and that the defendant had used due diligence in endeavouring to collect the money due upon the accounts.

Way, having obtained a rule for a new trial, or that judgment be entered for plaintiff, now moved to make the rule absolute.

Ingleby (*contra*)—Although Tidemann by virtue of his employment as an agent did not possess the lien claimed, he did so by virtue of a special agreement. He was engaged to collect debts, and if repeated applications failed in inducing the debtors to pay, it became his duty to take out summonses against them, and this he employed Mr. Mildred, his attorney, to do, with the knowledge, of course, that the expense of this step must be borne by himself. If the defendant had no right to sue, the plaintiff had no property in the plaint notes at all; and if, on the other hand, the plaintiff waived the tort and sued in trover, it was incumbent on him to pay for any benefit which this act of his agent gave him.

The Chief Justice—By the Act regulating the legal profession the defendant was forbidden to take out the summonses.

Ingleby—He did not take them out himself, and therefore his arguing

was that the wrong person had been sued. The defendant's evidence upon the trial was that he retained the plaint notes as security for fees paid, commission, &c.

The CHIEF JUSTICE—Had he any right to detain them on these grounds.

Ingleby—Undoubtedly he has a lien on each plaint note for fees paid upon it.

The CHIEF JUSTICE—Have you a case to show that an unprofessional man, breaking the law with a view of getting fee or reward, has the rights you claim for him? Here the summonses were issued in expectation of his thus getting his commission.

Ingleby—It is not competent for the Court in this proceeding to look at the evidence. If the defendant had no right to employ Mr. Mildred to take out the summonses, the papers in my client's hands were not plaint notes at all.

The CHIEF JUSTICE—The Court below draw certain inferences, which they state. If you take a different view, must we not look at the evidence to see if it is justified? I confess that I see no grounds for calling upon *Mr. Way* to support his rule. The defendant's own statement shows that he claims to retain the notes for more than the amount paid by him, for which the tender was dispensed with, and this view the Court below affirms. I think there is no pretence for saying that he had a lien under the circumstances. If he says, "I don't act of myself, but employ a solicitor," so that in reality Mr. Mildred is made to act, not for him, but for the plaintiff, I do not now say what the effect would be; but he does not say this. Mr. Mildred had nothing to do with the plaintiff, and the whole course of the evidence shows that the defendant would have been in no different position had he taken out the summonses himself. The plaintiff contravenes the law, and wants to be paid for it. The rule must be made absolute, and I think it should be for entering a verdict for the plaintiff.

Ingleby—The Court cannot assess the damages.

Way would be satisfied if the verdict was for the delivering up of the

plaint notes, the Court fixing the damages at £30 to ensure that delivery.

Ingleby—According to the 61st clause of the Local Courts Act, the Court could not make the rule absolute in the way proposed.

The CHIEF JUSTICE would not impute to the Legislature the inconsequence of authorizing the Court to grant a rule *nisi* without the power to make it absolute. The direction of the Court would be that the defendant had no lien whatever over the plaint notes; and if it was in their power they would give the defendant costs, including the costs of the trial. If they had no power to do that, doubtless the Magistrates in whose discretion that matter rested would respect the expression of their opinion.

Rule absolute, with costs.

WALSH *against* GOODALL.

(Epitome of the above Case).

APPEAL from a judgment of the Supreme Court for the respondent which decided that Act No. 27 of 1862 did not repeal the Registration Act No. 8 of 1841, and that Act No. 27 was not in force on the 19th October, 1864, and was not validated by the Imperial Statute, 28 and 29th Vict., c. 63.

The contention of the respondent was that Act No. 27 of 1862 was not in force on the 19th October, 1864, and was not validated by Statute 27 and 28 Vict., c. 84, or by 28 and 29 Vict., c. 63; that the Court had no jurisdiction, being above £500; that there should have been a writ of error instead of petition of appeal, and that the appeal could not be heard, as notice had not been given under sec. 26 of Act No. 24 of 1855-6.

The Court sat on March 3, and held that they had jurisdiction; that there was no need of a writ of error; that the Act No. 27 of 1862 was in force on October 19, 1864, but reserved the question of notice till March 10, when the necessity of notice of appeal was considered waived by the respondent, even if notice were necessary, the Court giving no opinion on the necessity of notice. The costs of the appeal were allowed to the appellant.

FEBRUARY 13, 1866.

HATSWELL v. LADD.

EJECTMENT.—Possession—Verdict for Plaintiff by consent. Held on motion to set aside verdict and enter a nonsuit, that when there are two persons exercising acts prima facie *showing a right to a property, the evidence is in favour of the person with the title.*

THIS was an action of ejectment to recover a piece of land containing four acres, part of section of land No. 61, on the South Road. At the trial before Mr. Justice Boothby, the plaintiff deduced his title from the land grant, in 1839, to the conveyance to himself. He also proved that the previous owner, from whom he purchased, had given his neighbours travelling that road a licence to put their cattle into the four acres when they stayed at the public-house for the night, and that the fence which had been erected by some previous owner had always remained in the same state. The defendant proved that he had purchased the whole of one of the moieties of the said section, except this four acres, more than ten years since, and had taken possession of the four acres also, and exercised rights of ownership. A verdict was taken for the plaintiff by consent, leave being reserved to the defendant to move to set aside the verdict and to enter a nonsuit.

Ingleby, for defendant, obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the ground that plaintiff did not prove a right of entry on the land for twenty years before the commencement of the action; that the plaintiff did not prove a right of entry on the land for ten years before the commencement of this suit; that defendant proved his possession of the land for ten years and four months before the commencement of the suit. Cites Baker v. Combes, 19 Law J., C. P. 306. He now moved to make rule absolute.

Foster, for plaintiff, showed cause.

HANSON, C.J., delivered the judgment of the Court. This was an action to recover part of a section of land. The plaintiff, on the trial, gave evidence of title, and also that the person who had conveyed to him had on various occasions given licence to his neighbours, who were in the habit of travelling along the South Road with cattle, to put them in the four acres—the subject of the action—when they stayed at

the public-house. The defendant gave evidence that he had purchased the whole of one of the moieties of the section except this four acres rather more than ten years ago, and he stated that he had taken possession of the four acres as well, and had exercised rights of ownership with respect to it. It appeared, however, that the fence of the four acres which had been erected by some previous owner had always remained in the same position, although this in no way interfered with the user of the land in the way proved by his evidence. A verdict had at the trial been given by consent for the plaintiff, with liberty to move to set it aside and enter a verdict for the defendant, or to enter a nonsuit. The rule *nisi* was obtained on two grounds—first, that it was necessary for the plaintiff, in addition to the proof of title, to show possession by him within ten years; secondly, that the evidence must, at any rate, show that the defendant had not been in possession for upwards of ten years. On the first point, it is not necessary for the decision of this case to express any opinion, for the Court unanimously hold that the act of the owner of the property in giving licence to persons to occupy in the way described showed a continued possession in him. The case of Baker v. Combes was relied on on the part of the defendant to show that such acts were not sufficient; and, unquestionably, if the facts here had at all resembled those of Baker v. Combes, 19 L. J., C. P. 306; had the defendant fenced the land and kept everybody out of it, the putting of cattle in with the permission of the plaintiff would have been insufficient to have affected his possession. In this case, however, there was no possession on the part of the defendant which was inconsistent with that of the owner. We think, therefore, that the verdict for the plaintiff must stand. If there had been any doubt on this particular point, a new trial might have been ordered, with a view of ascertaining what was the nature of the alleged possession on the part of the defendant; but this is not the case. We are of opinion, on the authority of the case referred to in Common Bench, that when there are two persons exercising acts *prima facie* showing a right to a property, the evidence is in favour of the person with the title.

Rule discharged.

JULY 4, 1866.

FISHER v. TURNER.

FALSE IMPRISONMENT.—Action against Magistrate—Nonsuit—Master and Servants Act, No. 7 of 1863—Conviction under—Protection to Special Magistrate against Actions under No. 9 of 1849. Held that Conviction ought to have been quashed before Action brought—That Special Magistrate was entitled to Notice of Action, under Act for protection of Justices of the Peace.

THE Declaration stated that defendant, as and then being a Special Magistrate, with the power and authority of two Justices of our Lady the Queen, in and for the said Province of South Australia, on the 21st day of November, 1865, at Gawler, in the said Province, unlawfully and without reasonable and probable cause convicted him, the plaintiff, of an alleged offence, for that he the plaintiff being then under a contract to serve one J. M. and T. F. L. for the space of three years, deserted the said service before the said term had expired, whereof the plaintiff was not guilty, and wilfully and without just cause, on the said 21st day of November, issued his warrant of commitment, whereby he commanded Inspector Hamilton and others to take him, the plaintiff, and him to convey to the Gaol at Adelaide, and also commanded the keeper of the said Gaol to receive the plaintiff into his custody in the said Gaol, there to imprison him for the space of three calendar months, and for that the defendant assaulted the plaintiff and caused him to be apprehended and taken to her Majesty's Gaol at Adelaide, and there unlawfully to be kept and imprisoned from the time when he was so apprehended until he was discharged by one of the Judges of the Supreme Court on a writ of *habeas corpus*, whereby, &c. Plea, not guilty, by Statute No. 9 of 1849, sec. 10. At the trial the plaintiff was nonsuited.

Way (*Palmer* with him) subsequently obtained a rule to set aside the nonsuit on the grounds—first, that the conviction was bad upon the face of it, and therefore it was not necessary to quash it; second, that the Special Magistrate does not act as a Justice of the Peace, and has not, therefore, the protection of the Act No. 9 of 1849—Whittaker v. Low, Law Reports, 1 Exch., 79; and Hazeldine v. Grove, 3 Q.B., 997, having reference to the position of Police Magistrates as distinguished from ordinary Justices of the Peace. The Imperial Acts 10 Geo. IV., cap. 14, and 2 and 3 Vict., cap. 7.

Stow, Q.C., showed cause. There were two questions raised upon the rule as a ground for setting aside the nonsuit—that the alleged conviction being void and bad upon the face of it, it was not necessary to quash before an action was brought; and that a Special Magistrate does not act as a Justice of the Peace, and has not therefore the protection of the Act No. 9 of 1849.

The Court decided that the conviction was bad upon the face of it, and intimated that if an application had been made to quash it, they would have granted it.

Way, in reply to the second point, that a Special Magistrate does not act as a Justice of the Peace, and has not therefore the protection of the Act No. 9 of 1849.—A distinction had been clearly made by the Legislature in appointing Justices of the Peace and Special Magistrates, the latter having a special jurisdiction. The Legislature did not extend to Special Magistrates the protection which it was deemed necessary to afford to an inferior class of persons, such as were Justices of the Peace. As to the argument that Special Magistrates should be taken as meaning Justices of the Peace also, because by the Act of 1865 they had the powers of two Justices of the Peace, I cite Morgan v. Barner, 2 Barnwell and Cresswell, 729. The defendant had jurisdiction to enter upon an investigation, but it was only because he went beyond that jurisdiction that the action had been brought.

Cur. adv. vult.

JULY 20.

GWYNNE, J.—In this case I understand the main question to be, whether or not since the recent Statute it was necessary in all instances that convictions should be quashed before actions could be brought against Magistrates; and that it was contended that even if the conviction was bad upon the face of it, this preliminary to bringing an action must be taken. I confess that I feel a great difficulty in coming to a conclusion upon the matter. Taking the words of the Act, it seemed clear in all instances as a *sine qua non* to bringing an action against a Magistrate, the conviction must be quashed. The proviso on the subject was without condition or limitation, but it was contended on the other hand that the

following words must be implied :—"Provided also that if the conviction is on the face of it bad it shall not be necessary to quash it." I, however, am in great doubt respecting it. I had suggested to my learned colleagues that the question should be re-argued; but I do not know that such a course would be productive of any good. Under the law as it before stood, if the conviction was bad on the face of it, it was not requisite to quash it, on the principle that it was not necessary to do a nugatory act; and that if it was bad in itself, to quash it would be a work of supererogation. Surely there had been some case upon the point since the law was altered, and if there had he should be glad to have it pointed out.

Stow, Q.C.—I should be glad of an opportunity to re-argue the matter. At first the Court were about to refuse the rule on this point, and I have not looked so fully into that branch of the case as otherwise I probably would have done. I would submit that the conviction should be quashed in every instance.

HANSON, C.J.—I believe I have looked at every case decided since the passing of the Act, and the general result of my search was to ascertain that no action had ever been brought against a Magistrate for anything done under a conviction unless that conviction had first been quashed, and therefore it had never been necessary to decide the particular point now raised. In every case the Judges seemed to treat the language of the clause as exhaustive, the only question being whether the question fell within sec. 1 or 2. There was one case in which an action was brought when an order had not been quashed; but that was an order of a Magistrate in reference to some contributions to abbey lands made by the owners themselves, so that it did not come within the Act. I should also like to have this matter re-argued.

BOOTHBY, J.—I have looked into the cases, and I believe that none can be found where, when a conviction was bad on its face, its existence was recognised at all in a Court of Law. The absence of language to that effect in an Act he did not wonder at, as it would be out of the question for any Legislature to introduce it. The point rested on one of the clearest principles of law, that any defect upon a document quashed it of itself. I should be very glad to hear further argument.

The rule was directed to be set down to be re-argued.

October 11, 1866.

The rule now came on to be re-argued.

Stow, Q.C., against the rule—The conviction was not bad upon the face of it, and was made in a matter in which the Special Magistrate had jurisdiction. There were only two clauses of the Statute (No. 9 of 1849) to which it was necessary to direct attention. In sec. 1, it was provided —"That every action hereafter to be brought against any Justice of the Peace for any act done by him in the execution of his duty as such Justice, with respect to any matter within his jurisdiction as such Justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause; and if at the trial of any such action upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant." The second clause of the Act was as follows:—"And be it enacted that for any act done by a Justice of the Peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby or by an act done under any conviction or order made, or warrant issued by such Justice in any such matter, may maintain an action against such Justice in the same form and in the same case as he might have done before the passing of this ordinance, without making any allegation in his declaration that the act complained of was done maliciously and without reasonable and probable cause. Provided nevertheless that no such action shall be brought for anything done under such conviction or order until after such conviction or order shall have been quashed either upon appeal, or upon application to the Supreme Court." Before the passing of the Act 43, Geo. IV., if two Justices made a conviction in a matter over which they had jurisdiction, if that conviction was good upon the face of it, they were protected from all proceedings; but if any irregularity appeared upon the face, or existed in the manner in which the conviction was made, the Justice was liable to an action after the conviction should have been quashed. Of course, in respect to other convictions, either in those appearing bad on the face or those appearing on their face to be good, yet bad through some extrinsic fact, a Magistrate had no protection whatever, but was liable to an action if he acted in a matter over which the law gave him

no authority; and he was in the same position in a matter over which he had jurisdiction if any irregularity was brought forward which led the Court to quash the proceedings. The Act of Geo. III. provided that nothing except 2d. should be recovered for any act done within the jurisdiction of the Magistrate, without specially alleging in the declaration that it was done maliciously and without reasonable and probable cause. The decisions under this Act showed that this applied only to cases in which the Justices had a general jurisdiction over the subject-matter, but where, by reason of some irregularity, the conviction had been quashed; and not to matters in which they had no jurisdiction. In respect to all other matters done without their jurisdiction they were liable to action for trespass—Paley on Convictions. The 1st and 2nd clauses of the Act 1849 were entirely exhaustive. The contention of the plaintiff's counsel was, that in the second clause the word conviction meant conviction in its strict sense—that was to say, the decision of a competent person in a matter over which he had jurisdiction; but that was in effect to make the Act entirely nugatory, and inoperative. In Paley on Convictions, it was laid down that whether a conviction was bad upon the face of it, or good upon the face of it, it was necessary it should be quashed before an action could be brought. It was evident the Act of 1849 was passed to remove all uncertainty, and afford the Justices further protection in the execution of their office, and unless he acted maliciously he should have notice of the quashing of his proceedings by the superior Court, and he had power to tender amends by paying money into Court, or applying to a Judge to stay proceedings. It would be straining the language of the Act to apply it to a third class of convictions which appeared to be good, but were really bad. The term must be used not it its legal but its popular sense, and the Court would give to the term, when there were two interpretations possible, that one which was most capable of carrying out the intention of the Legislature. There was no doubt the term conviction originated with the idea that what was written on the paper was the conviction in the mind of the Magistrate, and referred, in its popular acceptation, to all such orders made by him. Cases cited—Gray v. Cooksly and Clayton, 16 East., 13; Ratt v. Parkinson, 20 L.J., 208; Rogers v. Jones, 3 B. & C., 409; Peas, v. Chayter, 31 L.J., Magistrates' Cases, 1; Leary v. Patrick, 19 L.J., Magistrates' Cases, 211; Pedler v. Davis, 30 L.J., 374; Haylock v. Sparks 1 Ellis and B., 471; Weller v. Toke, 9 East., 363.

Way supported the rule—No authority had been quoted save that of Mr. Macnamara, in Paley on Convictions, which, however, was a mere opinion, and could not have any weight with the Court. The second section of the Act did not require a conviction or order bad upon its face to be quashed. The object of the Legislature must be gathered from the terms of the clause, and not from any fanciful theory which was not expressed therein. The law before the passing of this Act was, that it was necessary, when a conviction had been quashed, whether it was bad upon the face of it or not, to allege malice and want of reasonable or probable cause. That was the effect of the Act of George III.; but still, if a person who might have maintained an action without having the conviction quashed chose to go to the Court and have it quashed, then it was necessary for him to allege malice. That was clearly a position inimical to the interests of the plaintiff in such a case. If the Legislature had intended to inflict such a monstrous hardship on the people seeking justice at the hand of the Justices, it would surely have enacted the proviso in a separate section, or it would have used different words. The using of the words "no such action shall be brought" clearly showed it was meant no action such as that referred to in the first part of the clause. Where the conviction was bad upon the face of it, it was not necessary to allege malice and want of reasonable and probable cause, and therefore it was not necessary to have the conviction quashed. The second point taken by the other side was that the order referred to was not a warrant of conviction, and therefore did not require to be quashed under the provision of the second section of the Act, as it did not disclose any criminal offence whatever, and was therefore a nullity. (Paley on Convictions, Sir W. James's Reports, 178; Lord Kelynge's Reports, 6 Term Reports; Crepps v. Derwin, 1 Smith's Leading Cases, 657; Attorney-General v. Lord Hotham, Turner and Russell's Reports, 218 and 219.) The Court had already decided the order was a nullity by granting the release of the prisoner on *habeas*, and would it administer a different decision now with respect to this action? It could not be contended that the conviction or order would have stood one moment if a motion had been made to quash it. Cases cited—Cotton v. Cadwell, 3 N. & M., 399; Exparte Polan, Ley's Rep., Chancery Appeals, 356; and Vict. 21 and 22, chap. 73, sec. 1.

Cur. adv. vult.

OCTOBER 29, 1866.

GWYNNE, J.—The question in this case is whether, under the Protection to Justices Act, it is necessary, where a conviction is bad on the face of it, to quash it. I must confess I have had considerable doubt upon the point, and the fact that a general legal rule renders it unnecessary to do a nugatory act has had much weight on my mind. The conviction being void on the face of it, it seemed a nugatory and useless act to quash it; but looking at the Act and at the advantage that must accrue from having a fixed rule requiring all convictions to be quashed before action, I am disposed to think that the proper construction of the Act is to have the conviction in this case reversed. I am of the opinion that the rule to set aside the nonsuit should be discharged.

BOOTHBY, J.—I am entirely of a different opinion from my learned colleague, as I hold that the language of the Legislature, in speaking of "a conviction" here, as everywhere else, must be taken as meaning a lawful conviction.

HANSON, C.J.—In this case I have expressed my opinion during the course of the argument, and I do not feel it necessary to go at any length into the matter. It seems to me that the Act establishes two classes of cases. Where the Magistrate acts within his jurisdiction certain things are required to be alleged and proved. When he acts in excess of his jurisdiction either wholly or in part, other things have to be done, and the conviction must first of all be quashed. These two classes are exhaustive, as every possible act a Magistrate can do in the assumed execution of his duty must be within or beyond his jurisdiction. I would not therefore have thought it necessary to add anything but for the point urged by Mr. Way, that as in the case of Young v. Maher it was held that a conviction of this sort was a nullity, it would be inconsistent and unjust now to hold that it could be a bar to an action. If this case depended upon the effect which this Court should give to the conviction, and we had to decide whether the conviction could of itself be a bar in point of law to an action brought by the party who had been imprisoned under it, there would be some force in the argument; but we are not called upon to do this; we are simply to give the best interpretation we are able, in order to give effect to a part of the legislation of the province. The Legislature has chosen to impose as a condition that

the conviction should be quashed before action, as also that notice must be given to the Magistrate. We are not to judge of the expediency or propriety of those provisions. We find a condition precedent prescribed by the Act, and until it is observed the plaintiff has no right of action.

Rule discharged with costs.

BOOTHBY, J.—The prisoner in this case was discharged on *habeas corpus* upon the ground that the conviction was illegal on the face of it.

HANSON, C.J.—There is a case which I mentioned on the argument, but to which I had mislaid the reference, in which it was held under the old Act that a discharge under a *habeas* is not for the purposes of the Act equivalent to quashing the conviction. The case is Gray v. Cookson, in 16 East.

JULY 13, 1866.

BOORD v. BOORD.

INDEBITATUS ASSUMPSIT.—Promise—Contract—Consideration. Plea, set-off for £500, money agreed to be paid by Plaintiff to Defendant in consideration that Defendant would come from England to South Australia. The promise relied upon was in a letter from Plaintiff in these terms—"This I promise you, that on your arrival in the Colony I will make you a present of £500, say Five Hundred Pounds, if you will please accept the same, but must decline putting my name to paper for any amount whatever." Held, that the plea was not supported by the evidence, and that no legal contract or obligation to pay ever arose between the parties.

ACTION to recover a sum of £400, upon a We O. U. for £200 and an acceptance for £200 given by defendant to plaintiff, and interest thereon. The defendant pleaded, amongst other pleas, that plaintiff was indebted to the defendant in the sum of £500 for money agreed to be paid by the said plaintiff to the defendant in consideration that the defendant would come from England to the Province of South Australia. The cause was tried before the Chief Justice, in June last, when a verdict was found for the plaintiff by consent, leave reserved to defendant to move to enter a verdict for him.

Stow, Q.C., pursuant to leave reserved, obtained a rule *nisi* to set aside the verdict and enter a verdict for defendant, on the ground

that defendant coming to South Australia at the request of the plaintiff was a sufficient consideration (Surcome v. Pinniger, 22, Law Journal, Equity, 419. Shadwell v. Shadwell, Com. B., N.S., p. 679).

Way showed cause. Was there any consideration to support the promise made by the plaintiff? The argument of the defendant was that the true meaning of the words was this:—If you will come to the colony, I will make you a present of £500. Assuming that to be the real nature of the contract, was the consideration sufficient? To decide this question in the affirmative it would be requisite to show that the promise was the moving cause, or, at all events, one of the motives which induced the defendant to come to the colony. If he had already determined to proceed thither, neither detriment to himself nor benefit to his brother could result from the performance of that promise, and it was abundantly clear from the correspondence that his resolution to do so was fixed prior to the letter from the plaintiff, dated January 18th. The consideration could not be gathered from the prior letters, but must be apparent from the contract itself; but here, even taking it for granted that the letter of January 18th, if acted upon, would have constituted adequate consideration, there was no evidence to show that that letter was one of the motives inducing his departure for South Australia. The words "on your arrival in the colony" merely marked the time for the performance of a naked promise, unsupported by any consideration. Thus, as has been put by Mr. Justice Gwynne, a bald promise made in these words—"if you will come to my office I will give you £10"—could not beget any consideration. It was begging the question to say that the defendant might have contracted liabilities on the faith of this promise, for that could never create a consideration where none existed in the contract itself. Surcome v. Pinniger (22 L.J., N.S., Equity) had really no bearing on this matter, for the point decided there was that part performance of the contract took the case out of the Statute; and the great distinction between Shadwell v. Shadwell, quoted on moving the rule *nisi*, and the present case was this—that in that instance a prior request was admitted, and was urged as part of the consideration.

Daly—The contract was bad, owing to there having been no assent to or acceptance of it on the part of the defendant, even supposing that a

good consideration had been imported into it. The only ground upon which the other side could imply an acceptance was the fact that the journey to Adelaide had been made. If the defendant did that, which formed the inducement for the promise, no acceptance was requisite. In Mozley v. Tinkler, 1 Cromp. Mees., and Ros., 692, the action, which was one of assumpsit on a guarantee, turned on these words, "I have no objection to be answerable as far as £50," if a certain arithmetic was published; but it was held that the publication of the book did not sufficiently imply an acceptance, and that therefore the guarantee could not be tortured into a complete and comprehensive contract. In McIver v. Richardson (1 Maule and S., 557), action of assumpsit, it was held that the words, "I have no objection to guarantee you against any loss in giving credit to" a certain firm, gave no adequate guarantee, because there was no notice of acceptance and no consent to regard it as conclusive. On the grounds of absence of consideration, absence of mutuality, and on the ground of the nature of the inferences to be drawn from the evidence, he contended that the Court must hold that the words set out could not be "tortured into a comprehensive or complete contract."

Stow, in reply—With regard to the point last treated of, that if there was a binding promise to pay a certain sum of money on the performance of a certain act; if that act was performed, nothing would deliver the promisor from the payment of the money except a release. Here the whole case rested on the letters and on the fact that the defendant came to the colony, and the absence of a request for the money by the defendant had no bearing on the question. If, however, the Court held differently, defendant would be placed in a singular position, for he had been debarred from producing evidence on the trial, although he was in a position to prove personally and by other witnesses that he had made frequent requests for the £500, with which the plaintiff had not been in a position to comply. I shall consequently in that event ask leave to move for a new trial on the ground of surprise. It was clear that a promise to pay a sum of money had been made by the plaintiff; and the question came back to this, whether there had been sufficient consideration. The £500 was not promised as an inducement for him not to draw upon the plaintiff, for he was absolutely prohibited from doing so. The Court had a right to infer that the £500 was promised to facilitate

S. E. Boord's arrangements for his departure for South Australia, and the existence of some consideration had been abundantly shown.

Ingleby cited Sturlyn v. Albany, 1 Croke, p. 67; Traver v. ———, Siderfin's Reps. 57; and Chitty, p. 22, to show that a consideration, however insignificant might be its character, was sufficient to render a promise a binding contract; also that where the performance of an act was to the detriment of the promisee, an express request need not be proved, although it had to be where it was to the benefit of the promisor.

Cur. adv. vult.

AUGUST 3, 1866.

BOOTHBY, J.—The plea of set-off is not, in my opinion, supported by the evidence adduced in its support; but as such evidence would, I think, support a bill on the Equity side of the Court, the practical and just course to pursue would be for the defendant to withdraw from the present record his plea of set-off, and to allow the plaintiff to retain his verdict, but the Court to restrain execution until an application by the defendant to the equity side of the Court has been disposed of, so that if successful, the fruits of a decree in the present defendant's favour on a bill in equity may be used as payment *pro tanto* to the present plaintiff of the amount of his verdict and costs at law.

GWYNNE, J.—This is an action of *indebitatus assumpsit*, brought by the plaintiff against the defendant to recover £400. The counts are upon a bill of exchange, and are the ordinary ones. Several pleas are put on the record by the defendant, but it is only necessary on the present occasion to notice the third plea, conceived in these words:—"And the defendant, as to the whole of the declaration, says that the plaintiff at the commencement of this suit was and still is indebted to the defendant in the sum of £500, for money agreed to be paid by the plaintiff to the defendant in consideration that the defendant would come from England to the Province of South Australia; and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the defendant to the performance of the said agreement; yet the plaintiff did not perform his part thereof, which debt the defendant is willing to set-off against the plaintiff's claim to the amount thereof,

and hereby claims from the plaintiff £100, being the balance due upon such set-off." Now, the general question raised upon this argument was whether the evidence adduced upon the trial before my learned colleague the Chief Justice was sufficient to support the plea of set-off. It is supported by precisely the same evidence as would have supported a similar claim if put forth in a declaration on the part of the defendant, and it appears to me that the set-off of a liquidated sum of £500 would clearly be a good one if it has the sufficient legal requisites of a contract. The plea here set forth an executory contract; and although the general rule of law for testing a contract is to ascertain whether both parties are bound, inasmuch as unless this is the case neither is bound; yet there are exceptions, as in a contract where the duty is altogether to be performed by one of the parties to it. The case of Morton v. Vaux is a late authority upon this subject. Thus, if a person says to another, "If you choose to give A.B. credit for certain goods, I am willing to be responsible for him." Although no communication may be made to the person in whose favour the guarantee is given, yet if the goods are supplied, the party supplying them can afterwards sue upon that contract, notwithstanding that he was never legally bound to furnish the goods or legally liable according to the contract. That, therefore, is an exception. So here, assuming that the evidence shows there is a contract between the parties, as the defendant came out to the colony, and did everything imposed on him under the contract, notwithstanding that he was not bound under it to come out, yet his coming would be sufficient consideration, and the plaintiff would be liable, although not being so liable before his brother came to the colony. But although I think all these requisites are present, supposing the interpretation put upon the contract by *Mr. Stow* is a valid one, the question comes, what is the real nature of the contract? On referring to Chitty, Jun.'s, very able work on contracts, I find these remarks:—"And as the meaning to be put on a contract is that which is the plain, clear, and obvious result of the premises used therein, so these premises should be understood in their plain, ordinary, and popular sense, unless they have reference to the subject matter and the known usages of trade to have acquired a different meaning." Now the evidence relied on by the defendant in support of this case is just this. It appears that the defendant was in England in uncomfortable circumstances, and desired to come to this colony. A communication takes place between him and his brother, the plaintiff,

residing in South Australia, in which the former gives expression to such desire, and asks counsel and advice, and the latter certainly advises him to come. Several letters pass, and the defendant at one time writes that his difficulties are so great that he does not see how he can arrange with his creditors, and that therefore he thinks he shall be obliged to draw upon the plaintiff here for a few hundreds. That letter brings out the reply relied on as constituting the contract. It is dated January 18, 1860, and is conceived in these words, after other extraneous matters are dealt with :—"This I promise you, that on your arrival in the colony I will make you a present of £500, if you will please accept the same, but must decline putting my name to paper for any amount whatever." That means, "I am not disposed, nor will I sign promissory notes or bills of exchange, but I will give you £500 as a present on your arrival in the colony." Now, the first thing that struck me when I heard the case was the use of the term "present." What is the meaning of it? I find in Webster, which is a very valuable dictionary, the following :—"Present—That which is presented or given; a gift or donity; something given or offered to another gratuitously." When, therefore, I find a letter of promise in which the promisor says, "I will not put my name to paper, but I will give you £500 as a present, gratuitously and without consideration," I apprehend he did not intend in using that language to incur a legal liability, and I cannot believe that the defendant, to whom this promise was made, could have understood or believed such to be the intention of the language used. To illustrate the popular meaning of "present," suppose any one buying or ordering goods should say to the party from whom he is obtaining them, "I will make you a present of so much money," the other would say at once, "I don't want a present; I demand the price of the goods as a right, the word present is altogether an inappropriate word to apply to the relationship between us." The popular idea of a present is that given without consideration, gratuitously, and without intention of incurring a legal liability to perform. That being, then, the language used here, I think the defendant must have so understood it. The plaintiff merely designed the £500 as a gratuity on defendant's coming out to the colony, and in that light the promise was viewed. And I am the more led to that conclusion by the conduct of defendant, for undoubtedly you may look at the conduct of the parties after the contract. Another way of putting the language, in my opinion, would be this :—"I will make you

a present on your arrival in the colony," the arrival in the colony being only used to mark the time or occasion upon which the promise is made. It has been ably put by *Mr. Stow*, as if it was a condition—" If you will come to the colony of South Australia, then I will give you £500." If that were so, undoubtedly the promise would be one which the law would support as a contract, and one upon which assumpsit would lie; but, to my mind, that is not the natural or reasonable construction of the term used. There is a difference between saying, " If you come out I will give you something," and " I will not put my name upon paper, but on your arrival I will make you a present of so much." Here, also, the idea of coming out emanated with the plaintiff. He consulted with the defendant, told him that it would be for his advantage to come out, and the matter was altogether one for his (the defendant's) own benefit. It is the duty of the Court in a case of this kind to see whether there is any contract at all; and, secondly, to interpret it. My opinion is that this is not the language of a contract, but merely refers to a gratuitous favour on the part of the plaintiff, and was so understood by the defendant. Undoubtedly, if I could come to any other conclusion on this, the whole requisites of a contract exist, for the relation between the promise and the coming out is that subsisting between a promise and consideration. If the coming out was intended as a consideration, it would have been a sufficient one; but I give my judgment entirely upon the interpretation I have put upon the language used, and the conduct of the parties; and although the plaintiff may be bound morally to pay, my duty is not to dispose of the case according to the rules of casuists, but according to the rules of law. It therefore appears to me that no contract or legal obligation to pay ever arose between the parties. The case of Shadwell v. Shadwell has been referred to. There, two Judges held that where the nephew Shadwell engaged to marry, a promise to give an annuity was binding; that is, the performance of an agreement which the party was not legally liable to perform. That view, however, was ably opposed by Justice Byles; and I think I may, without arrogance, say that I entirely agree with his judgment. I believe, too, that it will be followed in preference to those of the other Judges. I observe that Mr. Shadwell died afterwards, and the matter was compromised; but Justice Byles's judgment regulates Mr. Chitty in writing his text upon this subject.

HANSON, C.J.—In this case I also am of opinion that the rule must be discharged. On the trial it appeared to me that the whole question turned on the construction which I, as the Judge trying the cause, was bound to put on the letter of the plaintiff of 18th January, 1860. It appeared to me, and further consideration has only confirmed me in that view, that the intention of the plaintiff in writing that letter was, as expressed by my learned colleague, Mr. Justice Gwynne, to exclude pointedly the idea of incurring a legal liability—to offer to make a present as contra-distinguished from anything by which he could be bound in point of law. He purposed avoiding anything like a legal contract, and only intended making a promise without consideration, which, no doubt, he designed to fulfil. And this distinguishes the present case from those relied upon on the part of the defendant. I do not know that it is necessary to add anything more, except that, although I believe the letter of the defendant of April, 1861, and the conduct of the parties, so far as it appeared, was confirmatory of that view, yet that my judgment does not rest in any degree upon anything that took place subsequently on the part of the defendant. After the receipt of the plaintiff's letter, nothing was shown as having been done, or as having been communicated by the defendant to his brother, which would have thrown upon the plaintiff the duty of disavowal, by showing that the language he had used was taken in a different sense from that which it appeared to, or did, mean. I refer to this point for the purpose of saying that if I thought it was necessary for the decision of this case to take into consideration the conduct of the parties after the defendant's arrival here, it would only be just to him to have a new trial, and allow him to give evidence upon the matter ; but it appears to me that the conduct of the parties after S. E. Boord's arrival here, although it might not have been immaterial if there had been any ambiguity in the words of the plaintiff, was not at all necessary to consider where they are clear and unambiguous as they seem to me.

Rule discharged.

AUGUST 27, 1866.

CAPLE v. FRISBY.

ORDER of a JUDGE in Chambers setting aside a Judgment and Execution issued out of this Court upon a certiorari, *removing a Judgment from the Local Court, and remitting case back to Local Court—Motion to set Order aside. Order confirmed, on Defendant filing affidavit of merits.*

IN this case judgment was against the defendant, representing the firm of H. Frisby & Co., in the Adelaide Local Court. That judgment was subsequently removed by *certiorari* into the Supreme Court, and a *ca. sa.* issued thereon. Subsequently an application was made before Mr. Justice Boothby in Chambers to set aside the judgment and *certiorari*, on the ground that after the accruing of the cause of action, and before action brought, the defendant had executed a deed of assignment under the provisions of the Insolvent Act. The learned Judge made the order asked for, and remitted the proceedings back to the Local Court. The *Attorney-General* now moved to set aside that order, and in support of it an affidavit by J. Simpson was read, to the effect that the plaintiff had had no opportunity of inspecting the deed; and contended that a Judge in Chambers had no power to set aside a regular judgment of the Supreme Court; and the 183rd clause of the Insolvent Act showed, that notwithstanding a deed of assignment, judgment might regularly be obtained and execution issued against the assignor. Here the proceedings had been regular throughout, and had the defendant wished to avail himself of the deed, he ought to have come in and pleaded it. The learned counsel referred to the 54th section of the Local Courts Act, and to the case of Whitmore v. Wakerley, 11 Jur., N.S., 182.

Rule *nisi* granted.

OCTOBER 11, 1866.

Stow, Q.C., now showed cause. By a recent Act every judgment in the Local Court might be entered up in the Supreme Court, and on this being done it was necessary before any further proceedings could be taken that the judgment should be set aside by the Supreme Court, and that Court would not allow its process to be used for the oppression of a party who through the mistake of his counsel had had judgment entered

against him by default (as was the case in this instance), but would, upon seeing that the defendant could show merits were in his favour, set aside the judgment so as to allow him to appear and defend the action; and if the verdict went against him the proceedings could be again removed by *certiorari*, so that the plaintiff would not be injured in any way. The affidavits of the defendant and *Mr. Ingleby*, his attorney, stated that, previous to the action in the Local Court, out of which this motion arose, the defendant had made an assignment of all his effects under the Insolvent Act, and instructed Mr. Emerson, solicitor, to defend the action, of which he had notice from the plaintiff, but through some mistake he did not do so. Judgment went by default, and the defendant knew nothing about it until he was arrested under a writ of *ca. sa.*, out of this Court. He could not take action in the Local Court as the proceedings had been removed to the Supreme Court. I presume the Court in the exercise of its equitable jurisdiction would justify the order of the learned Judge, the only effect of which was to remove the difficulty in the way of the defendant, according to the ordinary practice of all Courts, going before the Court in which judgment was signed, and applying to have that judgment set aside upon an affidavit of merits. I contend that I had a right to file an affidavit of merits (Sanderson v. Proctor, 10 Exch. Reps., 189), and that the statement of facts which amounted to merits on the side of the defendant, was equal to the assertion of the belief by the party or his counsel that merits were on his side, and in support of his right to plead the assignment under the insolvency as an answer to the action. (Evans v. Gill, 1 Bos. and Pull, 52.) Simply applying to the Commissioner of Insolvency for the protection of the Insolvency Court would not have been sufficient, as the defendant claimed the right to have a judgment of the Local Court in his favour.

The *Attorney-General*, in reply—The defendant had now shifted his ground from that taken before the Judge in Chambers, and although the Supreme Court might have the power if it saw fit to remit back the case, a single Judge had not the power; but upon receiving an intimation that the Court is against me on that point, I will not press it any further. The defendant could not come in and file fresh affidavits in addition to those used before the Judge, to make up for the *laches* of his attorney; and even if they were admissible, they were defective, as they did not state in

express terms that according to conscience the defendant had a good defence on the merits. (Rowbotham v. Dupree, 5 Dowl, 557.) The deed under which the defendant claimed a defence to the action was bad upon the face of it, and not in accordance with the 183rd section of the Insolvency Act, or if it were, the defendant could have obtained protection under it. (Whitmore v. Wakerley.) The defendant ought not to be allowed to use affidavits of which the plaintiff had not had notice.

HANSON, C.J.—The order will be confirmed upon the defendant filing an affidavit of merits.

Rule discharged without costs, with liberty to the plaintiff to give notice within two days of his intention to abandon the action without costs.

AUGUST 27, 1866.

HANLIN v. HANLIN.

PROHIBITION.—Local Court, Limited Jurisdiction—Plea of set-off for sum exceeding £20—Cause tried by Special Magistrate—Verdict for Plaintiff—On motion for prohibition, on ground that jurisdiction of Magistrate was ousted. Held, that Magistrate had jurisdiction. Rule for Prohibition discharged.

THIS was an action brought in the Local Court of Kapunda to recover £10 12s. The defendant pleaded never indebted, and a set-off amounting to £21. The cause was set down for trial, limited jurisdiction. When called on for trial, defendant, by his counsel, appeared and objected that the Magistrate had no jurisdiction, as the claim of the defendant exceeded £20, and the cause ought to be tried before a Court of full jurisdiction. The Magistrate overruled the objection, whereupon the defendant left the Court. The trial of the cause proceeded in his absence, evidence was given by the plaintiff in support of his claim, and a verdict found for the plaintiff for the sum claimed.

The defendant obtained a rule *nisi* for a prohibition, and it now came on to be argued.

Palmer, for plaintiff, now showed cause. The Magistrate having the case before him had jurisdiction to examine whether the plea of set-off was *bona fide* or merely a fictitious one.

BOOTHBY, J.—That is, he should go on enquiring until he ascertained that there was a *bonâ fide* claim for a larger amount than his jurisdiction permitted him to adjudicate upon.

Way, in support of rule—The Local Courts Act only gives power to a Court of inferior jurisdiction in cases where the claim is under £20. Where the matter in dispute exceeded that sum, its jurisdiction was ousted. The word "claim" used in the Act meant not the amount ultimately adjudicated upon, but the demand. The plea showed that there was a claim for more than £20; for it was provided that a defendant claiming a set-off could plead it, and if it was upheld it went towards meeting the demand of the plaintiff. If it exceeded that, the defendant was entitled to a verdict for the balance. The Clerk, therefore, on seeing that there was a set-off above £20, should have given notice of trial in the Court of Full Jurisdiction (sec. 19, par. 5). The cases of Woodhams v. Newman, 7 C.B., 654; Beswick v. Capper, 7 C.B., 669, went to show the construction of the language of the County Courts Act, and support my argument; but under the Local Act the words are still more emphatic, and to hold that the Court of Limited Jurisdiction could take cognizance of a claim over £20 would be equivalent to saying that a Special Magistrate had a power expressly confined to a Special Magistrate and two Justices. This matter did not come within the rule of cases where a plea wanting in *bonâ fides* was set up to oust jurisdiction, for the fact of pleading a set-off larger than the original claim might accelerate the day of trial rather than retard it.—Avards and Wife v. Rhodes, 2 County Court Appeals, 90. If a Magistrate could enter into an enquiry as regarded £21, he could as regarded £100, or any amount whatsoever.

Palmer—The mere entry of a plea for a larger amount in no way ousts the jurisdiction, as the Court may enquire into its validity. Besides, in this case the defendant denied his indebtedness to the plaintiff, and therefore there was no set-off, as that could only be pleaded where there were mutual credits. The affidavits, too, should disclose that the Magistrate acted without jurisdiction or in excess of it (Hennell v. Fairlamb, 3 Esp., 104).

Way—There was a want of analogy between the proceedings before the County Courts at home and the Local Courts here, inasmuch as in the former, owing to the nature of the pleadings, a defect in jurisdiction was not discovered until the matter came on for trial; while in the latter the pleas had to be entered by the Clerk, and it rested with him to give notice, and to say in which Court the cause should be tried (see 13th, 23rd, 27th, and 76th sections of the Local Courts Act). A set-off was to be regarded as a "claim" under the meaning of the 76th clause.

HANSON, C.J.—In this case it seems to me the rule must be discharged. It appears that a summons was issued on the 24th April, and the case was set down for trial on the first Monday in the following month. The defendant denied the claim, and pleaded a set-off of £21, which, if the argument in support of the rule was correct, would have had the effect of postponing the trial for three weeks, seeing that at Kapunda the Local Court of Full Jurisdiction sits on the fourth Thursday in the month, while that of Limited Jurisdiction sits on the first, second, and third Mondays in each month. The chief question is whether, when a case is brought before a Magistrate, he has a right to enquire into the *bonâ fides* of the claim or not. I am of opinion that under the circumstances shown to exist in this instance that he was entitled to do so, and the fact of the defendant withdrawing from the Court upon the Magistrate saying that he would hear the cause left him free to receive evidence and give judgment for the plaintiff.

BOOTHBY, J.—I quite concur. To hold the contrary view would be to admit various mischiefs of a serious nature, and involve suitors in much unnecessary expense.

GWYNNE, J.—As I was not present to hear the arguments on the other side, it is not necessary for me to express an opinion. I do not say that I dissent, but simply that I pronounce no judgment in the matter.

Rule discharged with costs.

OCTOBER 11, 1866.

MACDONALD v. GALBRAITH.

PRACTICE.—Summons returnable at Chambers before the opening of the Office, and Order made thereon. Rule to set aside made absolute.

DURING the progress of the cause, the defendant's attorney had been served with a summons, calling upon him to file certain affidavits. The summons was signed by Mr. Justice Gwynne, and made returnable at a quarter before 10 o'clock in the morning. The defendant's attorney had been informed that Mr. Justice Boothby had ordered the summons to be made returnable at that time, but no such order appeared upon the face of the summons. He therefore gave plaintiff's attorney notice that he should not attend. The plaintiff's attorney attended the summons at the return before Mr. Justice Boothby, who made an order that defendant should file the affidavits, and pay the costs of that application. *Ingleby*, on behalf of the defendant, then obtained a rule *nisi*, calling upon the plaintiff to show cause why the order of Mr. Justice Boothby should not be set aside, on the grounds—first, that Mr. Justice Boothby had no power to make the said summons returnable at a quarter before 10 o'clock in the morning; secondly, that there did not appear on the face of the summons any authority for making the same returnable at that hour; and thirdly, that before the service of the said summons, and making the said order, the affidavits mentioned therein were filed.

Ingleby, this day, moved to make the rule absolute, when no cause being shown, upon the usual affidavit of service,

Rule was made absolute, with costs.

OCTOBER 26, 1866.

KING v. POCOCK.

PROHIBITION.—Local Courts Act—Cause struck out—Compensation to Defendant, with costs, under Clause 103, *on non-appearance of Plaintiff. Rule absolute for prohibition.*

THIS was an action in the Local Court of Morphett Vale, to which the defendant entered an appearance. The cause was set down for trial on the 22nd August, and notice given to the parties. On that day the

defendant and his attorney appeared, but neither the plaintiff nor any person on his behalf. The Court, composed of the Special Magistrate and two Justices, thereupon ordered the cause to be struck out, and awarded the defendant the sum of £5 as compensation, and his costs. The Clerk of the Court entered *judgment for defendant*, and taxed the costs, which, with the £5, amounted to £9 13s., and upon that judgment execution was issued against the plaintiff.

Bundey, for plaintiff, having obtained a rule *nisi* for a prohibition, now moved to make it absolute.

Way, for defendant, showed cause. The costs were properly taxed, as on the cause being struck out the action discontinued, under the provisions of clause 101 of the Local Courts Act; and even if they were improperly taxed, that would be no ground for a prohibition, because it was merely a mistake of the clerk, and could be reviewed by a summons before the Magistrate. The mere entry of the judgment was not a record of the Court, unless there was a special enactment to that effect, as in the English County Courts Act, and therefore this Court had power to look behind it to ascertain what the facts were.—Hoey v. Macfarlane, 4 C.B., N.S., 718.

HANSON, C.J.—Magistrates had no right to consider any question of remuneration when the Act fixed the remuneration to be allowed, and to allow certain extra costs because a person had brought an attorney from a distance was to violate the intention of the Act.

Rule absolute with costs.

OCTOBER 29, 1866.

JEWELL v. GILES AND ANOTHER.

LOCAL COURT, PORT ADELAIDE.

CASE FROM LOCAL COURT.

ADVANCE NOTE assigned by a Seaman. Held, not to be the subject of an action by Transferee.

THIS was an action to recover from the agents of the ship "Lord Lyndhurst" the sum of £4 upon the following document:—

"Seaman's Advance Note.

"No. of Seaman's Register Ticket.

"Dated the 16th day of March, 1866.

"One month after the ship 'Lord Lyndhurst' leaves the Lightship, pay to the order of George Ford, provided he sails in the said ship, the sum of Four Pounds — shillings, being one month's advance of wages, according to agreement.

"£4 0 0.

"Wm. Graham, Master.

"Owner.

"Agent.

"To Messrs. Giles & Smith.

"Payable at Port Adelaide.

"R. S. Magraith, Shipping Master."

A receipt for the amount of the note from plaintiff was endorsed, signed by Ford.

At the trial, evidence was given of the signatures to the note and receipt endorsed by Ford, and that Ford had sailed in the "Lord Lyndhurst" from the Lightship. The Special Magistrate gave judgment in favour of the plaintiff, subject to the opinion of this Court whether the document was assignable.

The case was argued on the 10th October on behalf of defendants by

Stow, Q.C.—The advance-note was an unlawful document, according to the Shipping Act, 17 and 18 Vict., chap. 104, and could not be assignable; and the only other ground on which the plaintiff could recover was that of an agreement; but that could not be set up, inasmuch as the alleged contract was not made between Ford, the original receiver of the note, and Giles & Smith, but between the Shipping Master and Giles & Smith; and then there was no consideration, except that Ford should sail in the vessel; but then the agreement must be subject to all the equities of the case.

Parker, for the plaintiff—Under the Act of George III. seamen's wages could be recovered by parishes and Gilbert's Unions, which were then in operation, but often when they applied they found that the seaman had disposed of his wages by some allotment-notes during the voyage; and the

Legislature, in seeking to prevent impositions and frauds on seamen, perhaps went a little too far. By subsequent legislation the allotment-notes were only allowed to be made to relatives of the seamen. The learned counsel had referred to the Act, but only read part of it; and so far from advance-notes being done away with, they were specially recognised in sec. 149, which provided the terms of the agreement to be entered into between masters and seamen. There was nothing in the Act to prevent the master advancing wages to seamen, and the evidence was that this had been done in the present case by an agreement that was entered into with Giles & Smith, and the terms had been fulfilled by Ford having sailed in the ship. There was no express power given in the Act to sue upon these advance-notes, but there was no restriction, and Ford having performed the consideration by sailing in the ship was entitled to the month's wages; and the power being given for the issue of these advance-notes, they must carry with them full power and authority to the holder.

Stow, in reply—It was admitted this was not a promissory-note, and it was clear it was not a note which could be sued upon by Statute; it would depend entirely upon the Common Law under the Property Act of 1860. Then this was not an agreement at all, as there was no proof of consideration; and the provision of the Shipping Act was that if advances were made it should be contemplated by the agreement.

HANSON, C.J.—This was a case reserved by the Special Magistrate at the Port, and the question is whether the advance-note of a sailor can be made the subject of an action by the transferee to whom it had been assigned by the sailor. I am of opinion that it cannot. Clearly it is not a promissory-note, and a person taking it, even admitting it to be a chose in action capable of being transferred, is not entitled to sue upon it, except subject to all equities affecting the assignor. The public should understand that in delays of this sort neither the respectability of the person giving these notes nor any other circumstances will make it safe to receive or advance money on these notes. I think the case reserved must be answered that the plaintiff was not entitled to recover in the action.

BOOTHBY, J., concurred.

GWYNNE, J.—There are two questions proposed to us by the Judge of the Local Court—Mr. Hawkes. First—Is the document sued upon

assignable? Second—If so, could the assignee sue thereupon in his own name? I shall confine myself to the first enquiry. The only two documents I am aware of that are assignable and can be sued upon as documents are a bill of exchange and a promissory-note. A bill of exchange is assignable by the custom of merchants, by long immemorial usage, and can be sued upon as a document *per se*, and not merely as evidence of some other contract. A promissory-note does not in common law possess the same characteristics; but they were conferred by the Statute of Anne. Before then it could not be sued upon nor assigned, yet might be made evidence of a debt. The document before us is not used as evidence of a collateral debt; but the assignee seeks to sue upon it as a document. I think he cannot, as a document is not assignable, and therefore he has no right of action.

Stow asked for costs.

GWYNNE, J.—I think the Court should encourage the reservation of questions of this sort. If Mr. Hawkes had given judgment without reserving a case, as the amount is below £30, we could not have interfered.

Question reserved answered in the negative, without costs.

OCTOBER 29, 1866.

PHILLIPS v. BENNETT.

PROHIBITION—Local Court—Limited Jurisdiction—Cause of action under £30—*nudum pactum. Held by* CHIEF JUSTICE, *and* GWYNNE, J., BOOTHBY, J., *dissentiente, that the Magistrate had Jurisdiction, that although the judgment was wrong in point of law, the Act gave this Court no power to interfere, no case having been reserved.*

ACTION by a Trustee of National School at Tothill's Creek, to recover from defendant the sum of £4 10s., the amount promised by defendant as a subscription on behalf of himself, his wife, and daughter, towards the building of a schoolroom. The cause was tried before the Special Magistrate, and judgment given in favour of the plaintiff. The Magistrate refused the application of the defendant's counsel to reserve a case for this Court.

Palmer, for defendant, moved for a rule *nisi* for a prohibition, on the ground that the plaint showed no cause of action, and that the promise was *nudum pactum*, without consideration.

GWYNNE, J.—This is an application for a prohibition on the ground that the plaint showed no cause of action. Looking at it, it appears to me to show what is called a *nudum pactum*, or a naked promise made without consideration. It was a promise made by the defendant for himself and one or two of his children to subscribe to a school or chapel, and such a promise to the Trustees or persons collecting money, however binding in point of morals, has no force whatever in law, being without consideration. In this case, therefore, the plaint exhibited simply and purely a naked promise. The Magistrate, however, entered into the case, and has, I understand, found a verdict for the plaintiff, and it is on this account that a prohibition is applied for. I must agree with the point he has taken, but the Legislature has thought fit to commit an extensive jurisdiction to Local Courts; and while in reference to matters involving £30 and upwards they have given an appeal to the Supreme Court on points of law, yet in questions under £30 they have left the decision entirely and wholly to those Courts. They have, so far as these questions are concerned, given us no power whatever to interfere; and therefore, assuming this to be a *nudum pactum*—the amount in dispute being below £30—we can do nothing. A *nudum pactum* sometimes assumes very subtle forms, and it requires nice discrimination to say whether there has really been a sufficient consideration; but that does not affect our position. I think the rule *nisi* must be refused—not on the ground that there is no cause of action, but that the Legislature has given this Court no power to interfere. I find this view of the matter taken in England, for in several cases under the Act it has been held that prohibition will not lie to a Judge of a County Court on the ground that in deciding what it is competent for him to decide he has made a mistake in point of law, because his judgment is unwise or unjust. It must be shown that he has exceeded, or is about to exceed, his jurisdiction. In this case the judgment in my opinion is unwise, illegal, and unjust; but still this Court has no power whatever to interfere. The point was argued in Ellis v. Watt, 8 C.B., 614; Jones v. Jones, 5 Dowl. & L., 628; and Forster v. Temple, Idem, 655.

BOOTHBY, J.—This is a matter of importance, and I differ entirely from

Mr. Justice Gwynne ; for the jurisdiction of this Court must by express words be taken away where there is an entire absence of jurisdiction in the Court below, as in the present case, to try matters of this kind. My learned colleague has said that the decision in this instance is perfectly illegal, and unless the Legislature prohibits by express enactment, we may exercise over Courts of inferior jurisdiction, the same powers as are exercised by the Courts of Westminster Hall.

HANSON, C.J.—In this case I am of opinion that the motion should be refused. The Local Courts Act, 1861, gives to the Local Courts cognizance of all personal actions when the debt or damage claimed is not more than £100, and this was such an action. It also gives power to the Special Magistrate to reserve any points of law for the decision of this Court, and it gives a right of appeal in cases for recovery of a claim under £30, if either party shall be dissatified with the determination or decision of the Court in point of law, or upon the admission or rejection of any evidence. In this cause the claim is less than £30, and no case has been reserved. Even, therefore, if the decision of the point was altogether erroneous in point of law, which certainly appears to have been the case, the matter was clearly within its jurisdiction, and the Act gives no power to this Court to interfere. No authority was cited in support of the motion, and in addition to the cases referred to by Mr. Justice Gwynne, the cases of *in re* Rayner, 5 C.B., 162, Guardians, &c., of Lixden v. Southgate, 10 Exch., 201, are distinct authorities in support of the view now taken by the Court. There will therefore be no rule.

Rule refused.

DECEMBER 3, 1866.

NATIONAL BANK OF AUSTRALASIA v. MULLEN.

LIABILITY on BANKING ACCOUNT.—Credit.—Defendant had an account with a Branch Bank of Plaintiff. He also opened an account at the same Bank in his own name, with the addition of the words, "on Nilan's account." Certain cheques were drawn from time to time, signed by Defendant, with the words added, "Nilan's estate." The question was, to whom was credit given ?

THE declaration contained the usual counts for money lent, money paid, and for interest. Plea, never indebted. The action was brought to recover

£762 16s. 8d., balance of defendant's overdrawn account with the plaintiff. Plaintiff's evidence was, that an account was opened by the defendant thus—"J. Mullen, in Nilan's account." Cheques, making up the amount claimed, were from time to time drawn by the defendant in his own name, with the words "Nilan's estate" underneath. The defendant also had an account in his own name only. The evidence of the defendant himself was, that on the death of one Thomas Nilan, his widow (wanting money to pay her husband's debts) applied through the defendant to the Manager of the Branch Bank for a sum of £500, who agreed to place that sum to her credit upon having title deeds of her property deposited with him. The deeds accordingly were deposited, and the account was about to be opened, when a difficulty was raised how Mrs. Nilan was to obtain money when she required it, as she could not write. The Manager then suggested that the account should be in defendant's name, with "in Nilan's account" added. That was done, and the cheques were signed "J. Mullen, Nilan's estate." At the trial, Mr. Justice Gwynne directed the Jury that, upon the evidence, the defendant was liable for the amount, but the Jury found a verdict for the defendant. A rule *nisi* was subsequently obtained by the plaintiff to set aside that verdict, and for a new trial between the parties.

DECEMBER 11, 1866.

The *Attorney-General (Mr. Boucaut)* now showed cause. The only evideuce which could be alleged to render the defendant liable was that of the cheques, but the mere production of cheques was not of itself sufficient evidence of money lent; it was *prima facie* evidence of payment of money that was due from the Bank. (See Fletcher v. Manning and Another, 12 M. & W., 571.) They were not evidence of money paid to defendant's use, because they were signed "Nilan's account," and were in fact for paying off debts of the deceased Nilan; and therefore it could not be said that the money was paid to the defendant for his own use, he having acted merely as an amanuensis. The Bank had not done what was necessary, namely, proved that the defendant had agreed to become liable, which they should have been able to do if that had been the case, by calling Mr. Nairne, the Manager of the Bank at Kapunda. The evidence on account of which the Judge refused a nonsuit when he applied for a nonsuit was, that admissions had been made by the defendant that

he owed the money; but on the other hand there was distinct evidence that he had spoken of it as the account in Nilan's estate, and expressed his belief that the estate would be able to pay it, thereby showing that the transaction was between Mrs. Nilan and the Bank, which was supported by the fact that Mrs. Nilan left her deeds with the Bank as security, and the origin of the account was the bill of exchange for £500 which Mr. Nairne lent to Mrs. Nilan, the defendant only undertaking to sign the cheques because of a difficulty which arose on account of her being unable to write her name. If it was attempted to make the defendant liable upon the bill, then it would be as surety, and not as primary debtor. It was for the Jury—not the Court—to say to whom the credit was given, and he submitted the Court would not disturb the verdict unless it was shown to be very strongly against the evidence. (Allaway v. Bennett, 6 Jurist, N.S., 347; Swain v. Hall, 3 Wilson's Reps., p. 45.)

HANSON, C.J.—It appears to me the whole security of banking transactions would be at an end if a person were to be allowed to open an account in his own name and draw cheques, and then upon such evidence deny his liability.

GWYNNE, J.—I also put it on the trial that the defendant could not by a mere verbal agreement alter the effect of the documentary evidence which was produced.

HANSON, C.J.—It seems that an account was opened by Mullen in his own name, but headed "Mullen, Nilan's Estate," to distinguish it from his own private account, and I look upon that in the same way as if a man opens an account, "A, B, or C," to distinguish it from another. I do not say that no evidence might be given to show that he was not liable, but the evidence was such that the Jury ought not upon that alone to have found a verdict for the defendant. I think, therefore, there should be a new trial; the costs to abide the event.

BOOTHBY, J.—I am of opinion there should be a new trial, although, supposing the defence to be fully developed, the ultimate result might be a verdict for the defendant. Still there is so much doubt that I think it ought to be settled.

Rule absolute.

DECEMBER 19, 1866.

J. M. SOLOMON v. OCHILTREE.

BAIL TO THE ACTION.—Rule nisi *to cancel bailpiece and to discharge defendant—The cause not tried—Rule discharged.*

THIS was an action brought by the consignee against the captain of a ship to recover damages for not delivering merchandise in good order and condition, according to bill of lading. The defendant had been arrested upon a writ of *capias*, and given bail to the action. The cause was set down for trial, but previous to its being called on the record was withdrawn.

A rule *nisi* was subsequently obtained by the defendant to show cause why the bailpiece should not be cancelled, and the defendant discharged from the writ of *capias*.

Stow, Q.C., for plaintiff now showed cause. The defendant had no right to ask to have the bailpiece removed; the application could only be made by the bail themselves; and therefore the ouly question was whether there was anything to entitle the defendant to his discharge from the writ of *capias*. I submit that in the absence of any precedent, the Court would never discharge a defendant from a writ of *capias* except from either irregularity or determination of the cause. If the defendant wished to hasten the trial he could have had the case carried down for trial by proviso. The plaintiff had very good reason for exercising the discretion given him by postponing the trial, inasmuch as at the September sittings a material witness on his behalf was unable to be procured; and it was not likely he would have consented to its going before a Jury when in a similar though not identical case of E. Solomon v. Ochiltree a verdict had been given for the defendant. The Court would never consent to enter into the merits of the case upon affidavit.—Orsley v. Walstaff.

The *Attorney-General*, in support of the rule, quoted the case of Pegler and Another v. Hesling, 5 Dowl. and L. The case cited by Mr. Stow was inapplicable, as it was a decision under the old Statute of George. In reply to the Court—The circumstances of the case had been entirely changed since the verdict in E. Solomon against the same defendant, and the Court if now applied to would not issue a *capias*.

GWYNNE, J.—Although I agreed with the verdict in that case I must consider the present motion just the same as if the other cause had not been tried.

HANSON, C.J.—It seems to me there are no grounds for the application, and the rule must be discharged.

GWYNNE, J., concurred.

BOOTHBY, J.—I, as a single Judge, would not have held the defendant to bail. The defendant could be examined before he left, and if the plaintiff got a verdict he could follow him to any part of the world to enforce it.

Rule discharged.

DECEMBER 19, 1866.

BANBURY v. TREMAINE.

LOCAL COURT.—Appeal.—Certiorari.

THIS was an action tried in the Local Court of Kapunda, when judgment was given for the plaintiff. The defendant gave notice of appeal to this Court. Before the time for appealing had expired, plaintiff issued a writ of *certiorari*, and removed the judgment into this Court. A rule *nisi* was obtained by the defendant to quash the *certiorari*, on the ground that the period for appealing had not expired.

Palmer, for defendant, now moved to make the rule absolute.

Stow, Q.C., showed cause. As the sum involved was under £30, there was no appeal, and therefore I do not understand the grounds of the motion.

Palmer, in reply—The Local Courts Act provided for appeals on points of law to the Supreme Court, and on points of fact to the Special Magistrate. In the present case the *certiorari* had been issued before the time of appeal had expired.

HANSON, C.J.—The question involved is a very important one, namely, whether the judgment of the Local Court could be considered by the Supreme Court before the time for moving for a new trial had expired. There might have been facts which the Special Magistrate was not aware of, and which would form a ground for a new trial, but if a *certiorari* had been granted he would be precluded from doing so.

Stow—If that is the point, the terms of the rule should be amended, and time allowed me to answer.

Palmer—The rule could not be drawn up on any grounds except those on which it had been. The question must arise out of them.

Cur. adv. vult.

HANSON, C.J.—The Court is of opinion that there should be no rule in either this case or in that of Benham v. Tremaine. The intention of the Act was to render the decision of the Magistrate final in all matters under £30, unless upon a review of all the circumstances he thought it right to reserve a point for the decision of the Supreme Court.

BOOTHBY, J.—I think an opportunity ought to be allowed to show facts which might prove that the discretion of the Magistrate had been improperly exercised.

Rule discharged.

NOTE.—In the case of Benham v. Tremaine the circumstances were similar, and the rule was discharged upon the same grounds.

DECEMBER 20, 1866.

EVANS v. THOMAS.

PROHIBITION—Maintenance of deserted children, under Act No. 11, 6*th Victoria*, 1843—*Paternity, proof of—Jurisdiction of Magistrate—Prohibition granted by* BOOTHBY, J., *and* GWYNNE, J.—HANSON, C.J., *dissentiente.*

ON the 9th May, 1866, an information was laid by Mary Evans, charging defendant that he being the father of an illegitimate female child of the complainant, under the age of ten years, did desert such child, leaving her

without proper support and maintenance. The information was heard before J. S. Browne, the Special Magistrate of Kapunda, on the 12th May, and an order was thereupon made by him for payment by the defendant to the said Mary Evans of 6s. per week, and in default of payment, to be levied by distress; and in the event of no sufficient distress, then that defendant should be imprisoned in the common Gaol for seven days.

Palmer, for defendant, on the 27th August last, obtained a rule *nisi* for a prohibition to stay the Magistrate from enforcing the order made by him, and now moved to make the rule absolute.

It was necessary before an order could be made for maintenance that the defendant should have been adjudicated father of the child, as until then he was under no legal obligation to support it, and that the order made did not adjudicate the defendant the father of the child, but merely ordered him to pay for its support.

Stow, Q.C., showed cause. It was impossible that there could be any prior adjudication that the defendant was the father, as a summons for maintenance was the only way in which the matter could be brought before the Magistrate; and in reference to the second point, the Court, he apprehended, would not grant a prohibition on account of a new error in form of an order in a matter in which the Magistrate had jurisdiction, and which could be altered at any time. The evidence of the woman herself and other material circumstances were sufficient to prove the paternity of the defendant, although it had not been, as it should properly have been, so adjudicated in the order.

Palmer, in reply—As the order contained no adjudication of paternity on the face of it, it was not such as a Magistrate could enforce, and that therefore, the Magistrate having acted in excess of jurisdiction, upon the authority of King v. Pocock, Sup. Court Rep. p. 71, a prohibition would lie.

Cur. adv. vult.

GWYNNE, J.—In the matter of an order by J. S. Browne, S.M., for the support of the illegitimate child of Mary Evans, a rule had been obtained to show cause why a prohibition should not issue. The proceedings, he presumed, were under the local Statute, No. 11, 6th Vict., intituled "An

Act to provide for the maintenance and relief of deserted wives and children, and other destitute persons, and to make the property of husbands and near relatives, to whose assistance they have a natural claim in certain circumstances, available for their support." There were only three sections he thought it necessary to refer to, namely, the 2nd, 3rd, and 6th. The order unquestionably purported to be made under and by virtue of the 3rd section, which enacted "That if any man shall unlawfully desert his wife . . . or any of his children under the age of ten years, leaving her or them without means of support, it shall be lawful for any Justice of the Peace, upon the complaint of such wife or children, or of some person on their behalf, to cause the husband or father, as the case may be, to be summoned to appear or to be brought by warrant before any two Justices of the Peace to answer such complaint . . . and if they shall be satisfied that the party complained of hath unlawfully, without reasonable cause, deserted his wife or any such children as aforesaid, and hath left them without means of support, such Justices shall so adjudge, and it shall be lawful for them to punish him for his said offence by a fine not exceeding £5, or by imprisonment, with or without hard labour, for any term not exceeding two months for the first offence, and by a fine not exceeding £10, or imprisonment with hard labour for a term not exceeding three months for a second or subsequent offence. Provided also that it shall be lawful for such Justices, if they shall deem it expedient so to do, to order that the husband or father complained of shall pay to the wife or to some responsible person on her behalf, or on behalf of the child or children, as the case may be, such reasonable sums of money for the maintenance of his wife or children, either weekly or otherwise as to the Justices shall seem fit." Then the 6th clause said, "The provisions of this Act shall extend to and include illegitimate children, provided that no man shall be taken to be the father of any illegitimate child upon the oath of the mother only. Provided also that in every case where it shall appear to the Justices that the mother of an illegitimate child is able to contribute to its support, it shall be lawful for him to direct that she shall so contribute as well as the father in such proportions respectively and in such manner as such Justices shall think fit; and if in any such case it shall appear that the mother only is of such ability it shall be lawful for the Justices to make an order in respect of her alone." As I have said, the present information appears to be under the third section. It could not be sup-

ported under the second, because that enacted that if it should be made to appear to the reasonable satisfaction of any Justice of the Peace upon the complaint of any "reputable householder" that such person had a father, and so on. Now, the information was laid by Mary Evans, who appeared to have been in domestic service, and had been delivered of two bastard children, and now appeared to be living upon the charity of some persons; therefore, without going into the question of whether she was a reputable person, it was quite clear she was not a householder. Then, there was no evidence before the Magistrate of the ability of the father to contribute. So there would be an objection on that ground also if the information were under this clause. In the information the matter was treated just the same as if the child was legitimate, and the defendant was charged as the father with deserting it. The meaning of desertion had been very fully discussed in reference to the Divorce Act, and a desertion of a child or wife must be either actual desertion or constructive; but in the present instance it never appeared that the woman and the putative father ever lived together, and so that it was impossible to say that he actually deserted the child. It appears to me, under the 3rd section, that the Magistrate had no power to make an order unless he adjudged that there had been desertion; but the evidence was that he made an order adjudging, not that the defendant had deserted the child, but that he should pay so much a week towards its maintenance. The proviso of the 3rd clause was to make persons contribute upon being convicted of desertion; but as there was no conviction of desertion here, it appears to me the Magistrate has exceeded his jurisdiction and had no power to make the order. I regret that I am forced to this conclusion, because I presume there was little doubt the man was the father of the child. But I am bound to ask myself the question—Is it shown to my satisfaction that the Magistrate has exceeded his authority? If I was of opinion he had, the defendant was entitled to his prohibition; and I must say that when a person was charged with desertion, and although there was no evidence of desertion, he was convicted, the order was bad. As it was, the Magistrate had exceeded his jurisdiction. I think, therefore, the prohibition must go.

Boothby, J.—In my opinion, the question is, whether the remedy sought is open to the applicant. He had another remedy, but having sought this it was the duty of the Court to put it into operation. Here

was an order not founded upon an adjudication of paternity—as there never had been one—and that of itself was sufficient to make it utterly without the jurisdiction of the Magistrate. I am of opinion there are clear grounds for making the rule absolute.

HANSON, C.J.—The ground upon which the rule *nisi* was granted was that there had been no prior adjudication by the Magistrate or by any tribunal whatever of the paternity of the defendant. Upon the argument that ground was substantially abandoned, and I do not understand that formed part of the proceedings upon which my learned colleagues have come to the conclusion they have. The view taken by Mr. Justice Boothby was that there was no adjudication of paternity, and that the adjudication of the defendant as father of the child was a necessary preliminary to making such an order as the one the Magistrate had made. Assuming that view was well founded, and that there ought to have been a prior adjudication, it still appears to me that this was not a case for a prohibition. I understand that a prohibition was to go only when an inferior Court had assumed to deal with matters which did not properly come within its jurisdiction at all, or, in dealing with matters within its jurisdiction, had taken a wrong view and done something which no evidence applicable to the case would warrant them in doing. If their conduct, though erroneous, did not fall within either of these, the rule of procedure was either by *mandamus* to compel them to do what they ought, or by *certiorari* to bring up the proceedings that they might be quashed upon the defect being made apparent to the Court; and therefore even if I admit the principle of my learned colleagues, I should still say it was not a case for prohibition, but I am unable to agree with the principle. There were many cases in English law in which the character of an act depended upon the relation of the party committing it to the other person, and until the relation was proved he could not incur any penal consequences; but I never heard it was necessary there should be any prior proceedings to warrant it. Take an illustration of a servant embezzling money. Unquestionably in such a case proof should be given that he was a servant; but there was no separate enquiry as regarded the relation. The Jury were not required to find formally whether he was a servant or not; it was simply whether he was guilty or not guilty. But leaving that branch of the subject, the charge was that the defendant was the father of the child, and deserted it. Evidence

appeared to have been given with regard to the paternity, and the order was made for him to support it. It appears to me, the matter being within the jurisdiction of the Magistrate, and he having made the order upon evidence, he had not done anything which appropriate evidence would not warrant him in doing. The evidence in the question of desertion would appear to be to a certain extent inadequate, but it was contrary to law to found a rule for prohibition upon a ground of objection which was not taken on the trial, and was not taken in the rule. It appears to me, therefore, that this is not a case for prohibition, as the matter was clearly within the jurisdiction of the Magistrate, and he had made no order but what he would have been warranted in making, supposing appropriate evidence had been adduced. However, as the majority of the Court are of a different opinion, the rule for prohibition must be made absolute.

Rule absolute.

JULY 20, 1866.

IN THE MATTER OF THE MURNINNIE BISMUTH AND COPPER MINING AND PATENT SMELTING COMPANY AND E. H. COSSINS.

COMPANIES ACT, No. 13, 1864.—*Order of Judge in Chambers—Appeal from—Held, that there was an Appeal to this Court from an Order of a Judge under sec.* 34—*Amendment of Register of Shares—Summary Jurisdiction—Where the claim of an alleged proprietor to be placed on the Register of Shares was resisted on the ground of absolute failure of consideration. Held, by* HANSON, C.J., *and* GWYNNE, J.—BOOTHBY, J., *dubitante—Affirming Order of* HANSON, C.J., *that the Court would not exercise its Summary Jurisdiction on disputed facts, but would direct an issue to ascertain the facts, or leave the claimant to his remedy by Bill.*

E. H. COSSINS, having discovered a mode of smelting bismuth ores, agreed to make over the process to some persons interested in Bismuth Mines, upon having certain shares in the Mine assigned to him. Afterwards, a Company was formed to work the Mine, and the original proprietors with E. H. Cossins were admitted as shareholders to the extent of their interest, but Cossins was not placed on the Register of Shares, excepting in respect of some shares that he had been allowed to sell. It was alleged that Cossins had warranted his process to be practicable and valuable, and that the grant of the interest in the Mine was absolutely

contingent upon those representations being true. And further, that upon being tried, the process was found to be utterly worthless. Cossins having been allowed to sign the memorandum deposited with the Register and to act as Director, but the Directors refused to place his name upon the Register of Shares, on the ground that the consideration having failed, he was not by the terms of his agreement entitled to the shares.

Application was then made by Cossins to the Chief Justice under the 34th clause of the Act, for an order to compel the Directors to enter his name upon the Register, in respect of a certain number of shares. The application was refused, and an order made dismissing the summons with costs. Cossins then applied to the Court, and obtained a rule *nisi* to show cause why the Register should not be amended by inserting the name of Cossins upon the Register of Shares, or why the order of the Chief Justice should not be set aside.

Ingleby and *Way* for Cossins. *Stow, Q.C.*, and *Belt*, for the Company.

October 18.

Stow showed cause.—This application was under the 34th clause of the Companies Act of 1864, which enacts, "When the name of any person is, without sufficient cause, entered in or omitted from the register of members of any Company under this Act, or when default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member of the Company, the person or member aggrieved, or any member of the Company, or the Company itself, may, by motion in the Supreme Court, or by application to a Judge sitting in Chambers, apply for an order that the register may be rectified." The clause further provided that "the Court or Judge may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members, or alleged members, or between any members or alleged members of the Company, and generally may in any such proceedings decide any question that it may be necessary or expedient to decide for the rectification of the register, and may direct an issue to be tried, in which any question of law may be raised." Inasmuch as express statutory power was given under the Companies Act

for disputes to be settled either by application to the Court or a Judge in Chambers, and no provision was made for appeal, that when such a Judge had given a decision on the question that decision was final, and could not be appealed against. (Smith v. Bird, 3 Dowl., P.C., 641.)

In reply to BOOTHBY, J.—A decision of a Judge could only be appealed against in matters relating to the business of the Court, as was distinctly laid down in the case of Graham v. Connell, 1 L.M. and P., 438. The Court could only exercise its appellate jurisdiction in matters relating to its business, and not in collateral ones; and whenever that jurisdiction had been exercised, as in the cases of Kilkenny and Great Southern Railway Company v. Fielden, 6 Exchq., 81, and Stokes v. Grissell, 14 C.B. Reps., 678, it was in cases relating to the business of the Court; but here express jurisdiction had been given to a Judge in Chambers. The case of *re* Anglo-French Porcelain Company *exparte* Harris, *5*, Hurleston and Norman, Exchequer N.S., 809, the Court refused to make an order on the ground stated.

Ingleby, in reply—The case of Graham v. Connell, which had been relied upon by the other side, was merely an application to the Court to set aside a rule *nisi* which had been obtained before a Judge, and the decision was that the defendant must go and show cause before the Judge in the first instance, and then if they were dissatisfied appeal. The cases of Robinson v. Burbidge, 1 L.M. & P., 94; Morris v. Manesty, 7 Q.B., 674, supports my argument that the power of appeal referred to all Judges' orders, unless specially excluded.

HANSON, C.J.—We will hear the rule argued, and postpone our decision upon this point.

Stow—The power which was given to the Court under the Companies Act of 1864 was entirely a discretionary power which the Court or Judge might exercise or not; that is to say, that it was not imperative upon them, or that could be claimed *ex debito justiciæ*. (*Exparte* Faris, 26 L.J., Chancery, 369, in the matter of the British Sugar Refining Company, and in Joint Stock Company's Act, 3 Kay, and J., 408.) Mr. Cossins sought to take advantage of the technical provisions of the Act to have his name inserted on the register, although justice might require

that it should be immediately taken off, and the shares vested in some one else. The Court had in the case of Hall v. Norfolk Estuary Company, 21 L.J., N.S. Exchq. Q.B., 94, refused to make an order for transfer of shares until the calls were paid, and in *exparte* Tooke, L.J., 18, Q.B., 343, it was held that the resolution of the Directors for a call was equivalent to a call, and refused to allow any transfers until the calls were paid. The agreement was that Cossins was not to be entitled to the shares until his process for smelting the bismuth ores had proved a success, and a patent obtained ; but so far from that being the case, the process had proved an utter failure. Where large and intricate questions were involved, as in this case, the Court would not exercise its summary jurisdiction by ordering a rectification of the register, but would leave the parties to obtain their rights in the ordinary way by a suit in law or equity.

Ingleby, in reply to HANSON, C.J., could not agree to an issue being taken before a Jury, as he assumed Cossins had a right to the shares, and did not choose to be fought by his own money, as would then be the case.

HANSON, C.J.—We must not try matters of fact upon affidavit. You must be prepared to argue that assuming these shares were to be transferred to you upon your process proving successful, and the process has not been successful, that you are still entitled to them.

Belt followed in opposing the rule, and quoted the cases of *exparte* Swan, 7 C.B. Reps., N.S., 400 ; Harris v. Anglo-French Porcelain Co. ; Sutton v. S.E. Railway Company, 35 New Law Repts., Exchq. 39 ; and Irish Peat Company v. Phillips, 30 L.J., N.S., Q.B., 114. The Court will not decide in a summary way when large interests were involved, and the parties were able to have the disputes settled in another way.

OCTOBER 29.

Ingleby, in reply—In the cases of the Anglo-French Porcelain Company and *exparte* Faris, quoted to show that the power vested in the Court of amending the register was discretionary and not absolute, went on an altogether different state of circumstances; the judgment of Justice Williams in *exparte* Swan, 7 C.B., N.S., 400, is a direct authority against such argument. Finally, he submitted that the language of the Act left the Court no alternative but to insert these shares on the register.

Way, on the same side, in reference to the possibility of amending the register where no distinctive numbers were attached to the shares, quoted Whittet's case, 2 De G. & J., 577. A contract entered into by original promoters made binding upon the Association must appear on the articles—Payne v. N.S.W. Coal and Intercolonial Navigation Co., 10 Exch., 283; Hutchison v. Surrey Gas Consumers' Company, 11 C.B., 687. In this instance the liability of shareholders was unlimited, and it was requisite that protection should be afforded them. (Barry v. Croskey, 2 Johnson & H., p. 1.) It was not suggested that Mr. Cossins's original representations were false, as he stated that the invention had not been fully tested; but if they had been the responsibility would have been restricted to the actual parties to the contract. (Woollaston's case, 4 De G. & J., 437; *exparte* Filgate, 11 L.T., N.S., 613.) Where there had been no misrepresentation the remedy was action. (Denton v. McNiel, L. Reps., 2 Eq. Cases, 352.)

Cur. adv. vult.

Hanson, C.J.—The Court will not exercise its summary jurisdiction in this case, but will direct an issue, or leave the claimant to his remedy by bill.

Rule discharged with costs.

October 18, 1866.

Case from the Criminal Court.

The Queen, on the Prosecution of William Dovell, against Charles Johnes.

TRUSTEE, Frauds by. — Act No. 1 *of* 1863, *sec.* 3. — *Power of Attorney —Information for converting money, the proceeds of the sale of goods entrusted to defendant, by virtue of a Power of Attorney to sell. Held, not to come within the meaning of the words of sec.* 3. *Conviction reversed.*

The case stated that Charles Johnes, on the nineteenth day of March, in the year of our Lord one thousand eight hundred and sixty-five, being then entrusted by one William Dovell with a certain power of attorney for the sale of certain goods and chattels, the property of him, the said

William Dovell, did by virtue of the said trust then, and whilst he was so entrusted as aforesaid, receive and take into his possession certain moneys to a large amount—to wit, to the amount of three hundred and thirteen pounds seven shillings and two pence, being the proceeds of the sale of the said goods and chattels for and in the name and on the account of the said William Dovell, and the said money then fraudulently and unlawfully did convert and appropriate to his own use and benefit, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity. It was proved that the defendant was entrusted by the prosecutor with a power of attorney for the sale of some household furniture, which was sold and the proceeds received by him and paid by him into his account at the Bank. The amount was subsequently withdrawn by him from the Bank, and the evidence justified the Jury in finding that it was appropriated by him to his own use with intent to defraud the prosecutor.

HANSON, C.J., before whom the prisoner was tried, directed the Jury that if they believed that the defendant converted to his own use the moneys forming the proceeds of the goods sold under the power of attorney with which he had been entrusted with intent to defraud the prosecutor, they should convict the defendant. The Jury found him guilty; but, the Chief Justice having some doubts on the points raised on the prisoner's behalf, judgment was reserved until the question should be considered.

The opinion of the Court was requested on the following points—1st. Did the conversion by the defendant to his own use of the moneys, the proceeds of the sale of the goods with the sale whereof the defendant was entrusted, with intent to defraud, constitute an offence at law? 2nd. Was it necessary to a conviction that the conversion of specific chattels should be alleged as proved?

Stow, Q.C., for the prisoner—The words of the 3rd section are—"If any person entrusted with any power of attorney for the sale or transfer of any property shall fraudulently sell or transfer or otherwise convert such property, or any part thereof, to his own use and benefit, he shall be guilty of a misdemeanour." Then the interpretation clause states—"The word 'property' in this Act shall also denote and include not only such real and personal property as may have been the original subject of

trust, but also any real or personal property into which the same may have been converted or exchanged." That might apply if the man in this case had been a bailee of this property, and in which case he would still be the bailee; and the words "or proceeds" had been added to avoid the difficulty of proving the identity of the property. Then the 5th clause provided—"If any person being a director, member, or public officer of any body corporate or public company shall fraudulently take or apply for his own use any of the money or other property of such body corporate or public company, he shall be guilty of a misdemeanour." But there the very words of the Act would exclude a case like this, as it must be the very identical property with which he had been entrusted.

GWYNNE, J.—According to the definition property might mean money; but it was absurd to suppose that it could mean money, because who ever heard of anybody being entrusted with a power of attorney to sell money?

Stow—Powers of attorney were not so much used in England as here, and where they were it was generally for the transfer of shares and stock, in reference to which it was clear this clause was framed.

HANSON, C.J.—The intention appeared to be that if a person took one share he was guilty of misdemeanour; but if he sold the whole and appropriated the money he was not.

Stow—That was evidently the effect of the enactment. The term "trustee" could not be applied to the defendant, and it was evident he could not be properly convicted under the 3rd clause, unless it was proved that he appropriated the original property for the sale of which he had a power of attorney. The words of the Statute must be strictly regarded, as no person could be made a criminal by implication. The property the defendant sold was not the original subject of a trust; he merely sold it under a power of attorney, and as soon as he sold it the power ceased. He might have been a bailee; but then a charge would have had to be laid under a different clause. To convict him under the present indictment it would have to be proved in the following terms—"That Charles Johnes, being entrusted by William Dovell with a power of attorney to sell three chairs, did fraudulently convert such proceeds arising from the sale of the said three chairs to his own use." That would be necessary

in order to make a good conviction under the Statute. The late decisions of the Courts were that effect must be given to every word of the enactment, and if there was any doubt the intendment must be in favour of, and not against the defendant. The word "such" in the clause must be taken as being synonymous with the word "same."

Ingleby, for the Crown—The interpretation clause must be taken to apply to the 3rd section of the Act, and the word "property" included every description of real and personal property, whether the original subject of a trust or the proceeds of such original property; and that if a person was entrusted with a power of attorney he was entrusted with the sale or transfer of that property. The word "trustee" in the latter portion of the clause meant a person who was entrusted with anything.

GWYNNE, J.—According to the Act, a trust must be in writing.

Ingleby—The power of attorney was no doubt in writing. There was the absence from the interpretation clause of the usual expression—"unless the context shall show a different meaning as attaching to the word," or language to that effect.

GWYNNE, J.—Suppose a person was left in charge of a power to sell or lease certain property, that would not be a trust, nor would he be a trustee. He was a trustee for the sale of the property in the popular sense of the word, but legally a power of sale was not a trust.

Ingleby—There was, of course, a distinction between a power of sale and a trust for sale. It was known what a difficulty there often was in law when power of sale was given to one person while another had the trust. The construction contended for by the counsel for the prisoner of the word "such" would entirely exclude what the Legislature asserted as to what "property" should mean. That the Court had nothing to do with. If the Legislature enacts certain things it must be taken to mean those things, although it might lead to an absurdity in some instances.

Cur. adv. vult.

OCTOBER 29, 1866.

JUDGMENT.

GWYNNE, J.—This was a case stated by my learned colleague the Chief Justice for the consideration of the Court, and the principal question

was upon the construction of the 3rd section of the Act No. 1 of 1863. That section is in these words :—"If any person entrusted with any power of attorney for the sale or transfer of any property shall fraudulently sell or transfer or otherwise convert such property or any part thereof to his own use or benefit, he shall be guilty of a misdemeanour." Looking at this section alone, and adopting the usual rule of construction for Acts of the Legislature, it would appear that the words 'such property" must mean the property mentioned before, namely, "property for the sale or transfer of which the person is entrusted with any power of attorney." Standing by itself, it is clear from that provision that the property the person must convert in order to be guilty under the section is the property respecting which the person is entrusted by virtue of the power of attorney. In the present case the prisoner did not convert the property so entrusted, but the proceeds of its sale, and therefore it would not seem to me to come within the meaning of the clause. But a difficulty arises upon the interpretation clause. There it is stated that "the word 'property' shall also denote and include not only such real and personal property as may have been the original subject of a trust, but also any real or personal property into which the same may have been converted and exchanged." But I see, on looking at the definition of trustee, that that word means a trustee under some express and not implied trust, created by some deed or will or instrument in writing. The words "original subject of a trust," in the interpretation of the term "property," must mean the subject of a written trust, and there is no pretence that the property abstracted in the present instance was in writing. It appears to me, therefore, that the definition of "property" may be applied to the Act generally, without its being applicable to the 3rd section. I think, therefore, on that point that the conviction was improper.

Boothby, J.—I also think it was improper. If the information was a valid one I would not hold that, under the construction of the Act, it is impossible to make the prisoner guilty; but I think he should not be discharged, but should remain in custody under the warrant of commitment. On the occurrence of the next Criminal Sittings he might then be tried again upon another information.

Hanson, C.J.—In this case I have had very great difficulty in coming to a conclusion, and had it simply involved a matter affecting the

civil rights of parties, I might, although not without hesitation, have adhered to the opinion I expressed at the trial. But this is an Act which creates a new offence, and I think, therefore, I am bound to construe it strictly. If, however, I construe it strictly, I am unable to hold either that a person entrusted with a power of attorney for the sale or transfer of property is a trustee within the meaning of the interpretation clause, or that the property to which the power of attorney relates is the original subject of a trust. I should feel no difficulty with regard to the term "such property" if I held it to be subject to a trust, for it is quite obvious from the very language used in the 16th section—"shall mean not only such real and personal property as may have been the original subject of a trust, but also the proceeds thereof"—that the wider interpretation is excluded in the earlier portions of a clause which refers to the original entrusting with property, and that consequently we must either refuse to give any meaning whatever to the words I have cited, or must treat them as enlarging the meaning of the word property when spoken of as "such" or "the same" property in the latter portion which refers to its fraudulent misappropriation. But, as I said before, having to interpret this as a penal Statute creating a criminal offence, I must construe it strictly, and therefore I am also of opinion that the conviction was improper, and that the prisoner must be discharged.

VICE ADMIRALTY COURT.

AUGUST 8, 1866.

THE "ELECTRIC."

[Before the Worshipful R. D. HANSON, Judge.]

SALVAGE, arising out of Towage.—Tender and payment into Court—Further sum awarded—Services rendered by Pilot salvage services—Voluntary assistance by strangers—Excess of amount for which vessel arrested—Costs allowed to Defendants.

THIS was a consolidated suit for salvage services rendered to the vessel "Electric." The promoters were Robert Woolnough, pilot; William Wells, master and owner of the steam-tug "Eleanor;" and Thomas Sheppard and crew of the whale-boat "Herald," against the "Electric," her cargo and freight, for the following services:—At day-dawn on the 23rd September,

1865, Woolnough was cruising about ten miles off shore to the northward of Glenelg in the cutter "Secret," when he observed a vessel near the land at Whitton's Bluff hove-to. The weather was at the time thick and hazy. The cutter ran down to the ship, and when sufficiently near the pilot hailed her to fill and go about. That was not done. He then boarded the ship, and found she was the "Electric," Robert Lewthwaite, master, from London, with a large number of immigrants and a general cargo of merchandise. According to the evidence of the promoters, the vessel was in a very dangerous position. The pilot at once ordered her to be put about, but in endeavouring to do so she missed stays. Two anchors were at once let go and cable paid out, one at 90 fathoms, the other at 60 fathoms. A signal for steam was hoisted. In the course of the morning the whale-boat "Herald," with Thomas Sheppard and a crew of five men, took off the Harbour-Master, Captain Duff, to render assistance, and they remained by the vessel until the arrival of the steamer "Eleanor." In the meantime, the master of the "Electric" went on shore to obtain the assistance of a steam-tug, Sheppard and his men taking him on shore in their boat, the "Herald." The boat then returned to the ship and remained by her, the pilot and Captain Duff maintaining control over the ship. At this time the ship had dragged her anchors, and her stern was within 228 yards from a rocky shore, in only four fathoms water, a gale blowing dead on shore. In the meantime, Captain Wells, master and owner of steam-tug "Eleanor," having heard that a ship was ashore near Marino, with a signal for steam flying, got up steam for the purpose of proceeding to the ship, when he was engaged by the agents of the vessel to proceed to the "Electric." The steam-tug was unable to get alongside, and a hawser was taken from the vessel by the crew of the "Herald." The vessel was then towed up to her anchors, and by the "Eleanor" towed to the Lightship, where she remained alongside the "Electric" all night. The whale-boat, after taking the hawser to the steam-tug, left to return to the shore, and in attempting to reach Glenelg their boat was swamped, and four out of the six men were drowned. The action of the salvors was instituted in the sum of £10,000.

Strangways, Way, and *Dempster* for the plaintiffs.

Stow, Q.C., for the defendants.

The case for the defendants was, that Woolnough was only entitled to be paid for pilot services. In order to entitle him to other than pilotage

reward, he must abandon his position as pilot. Cases cited—the "Joseph Harvey," 1 Robinson, 306; "Jonge Andries," 1 Swabey, 226; "General Palmer," 2 Haggard, 176. That Sheppard and his crew were engaged to take Captain Duff, the Harbour-Master of Glenelg, to the "Electric," in discharge of his duty as an officer of the Government, and that nothing they did brought them within the definition of salvors, and no public officer ought to make claim for salvage (Clifton, 3 Haggard, 117), and that they lost their right to salvage remuneration by quitting the spot before the steam-tug began to operate (the "India," 1 W. Robinson, 406). As to the claim of the "Eleanor," it had not been shown that the "Electric" was in any danger when she was taken in tow. The sum of £200 had been tendered to Captain Wells, and that amount was ample remuneration for his services, and had been paid into Court. None of the salvors had brought themselves within the rules entitling them to salvage remuneration.

Cur. adv. vult.

SEPTEMBER 22, 1866.

His Honor R. D. HANSON, Judge, delivered judgment—This is a consolidated suit of salvage, promoted by William Wells, master and owner, on behalf of himself and the crew of the steam-tug "Eleanor;" by Robert Woolnough, on behalf of himself and the crew of the pilot-cutter "Secret;" and by Thomas Sheppard, on behalf of himself and the crew of the whale-boat "Herald." The owners of the "Electric" deny that any salvage services were rendered by any of the claimants, but they bring into Court the sum of £200 as a compensation for the services of the steam-tug "Eleanor." As not unfrequently happens in these cases, there is a great conflict of testimony between the witnesses for the salvors and those for the ship, both with regard to the services rendered and the danger of the ship; and I confess that I should, upon some of the matters in dispute, have been glad to have been able to avail myself of the assistance of persons familiar with nautical affairs. Still the admitted facts in this case are such as I think to enable me to form an opinion as to the general character of those which are in dispute, and to decide with confidence as to the rights of the parties. It appears that on the 23rd of September, 1865, the "Electric" was seen by the crew of the pilot-cutter "Secret" near the shore, hove-to. The pilot-boat bore down, and rounded

to windward of the ship, which had been filled on before the pilot-boat reached her, and the pilot went on board. On the pilot getting on board an attempt was at once made under his direction to put the ship about, but she missed stays. Two anchors were then let go, and cable was paid out on one anchor to 90 fathoms, and on the other to 60. A signal for steam was then hoisted, and shortly afterwards the captain went on shore in the pilot-boat to procure a steam-tug, it being considered doubtful whether the signal for steam would be seen. While the ship was lying at anchor, the whale-boat "Herald" came on board bringing Captain Duff, the Harbour-Master of Glenelg, and a crew of five men, who remained on board till after the arrival of the steam-tug "Eleanor." In the meantime, intelligence had reached the promoter Wells, the owner and master of the "Eleanor," that a vessel was supposed to be ashore near Marino, and, after an ineffectual attempt to arrange for terms with the Collector of Customs, he determined to start on his own responsibility, having heard in the meantime the vessel was anchored and a signal for steam flying. After he had got up steam for the purpose, and just as he was leaving the wharf, he was shown a telegram from the agents of the vessel, directing a Mr. Cruttenden to engage his steamer to proceed to the "Electric;" but no agreement was made as to services or remuneration. After this the "Eleanor" proceeded to the "Electric," and on her arrival a proposal was made that, instead of towing off the vessel, she should take the immigrants on board. This proposal was rejected by the promoter Wells, and, a hawser having been passed to the steam-tug, the "Electric" was towed up to her anchors, one of which was raised and the other slipped; and, her head having canted to the northward, fore and aft sails were set upon her, and she was then towed to the Lightship, where she anchored for the night, the "Eleanor" being anchored beside her. While the "Electric" was being towed up to her anchors, the whale-boat "Herald," which had till then remained by the vessel, left for the purpose of returning to the shore, but was upset, and three of the crew were drowned. The Pilot Woolnough remained with the "Electric" during the night. Under these circumstances, the three suits have been instituted for salvage services; and the first question which I have to decide is, whether the "Electric" was in a position of actual or prospective danger, so that services rendered for the purpose and with the result of relieving her from such position are to be regarded as salvage services. The evidence with regard to this, so far as regards the opinions expressed by the different witnesses, is very

contradictory; but the admitted facts of the case are such as to leave on my mind no doubt that her position was one of very considerable peril, involving danger to the safety of the vessel and lives of the passengers. The evidence of the witnesses on both sides fixes the position of the anchor which was slipped with great precision as being 233 fathoms, or 466 yards from low-water mark. The length of cable paid out to this anchor was 90 fathoms, and the length of the vessel was 173 feet, or nearly 29 fathoms, so that the stern of the vessel was only about 114 fathoms, or 228 yards, from a rocky shore; and according to the statement of Richard Tapley, a witness for the respondents, only about 20 fathoms from the place where presumably it could not have ridden safely, for he says that the vessel would have ridden with her stern in a direct line for the shore 140 fathoms distant from the anchor. This circumstance, if it stood alone, would convince me that the position of the vessel was one of great danger—one in which no man anxious for the safety of the vessel or the lives of the passengers would willingly have allowed her to remain. But it does not stand alone, for the evidence which fixes with so much precision the position of the anchor at the time it was slipped, and the soundings between that spot and the shore, taken in connection with the equally precise evidence of the mate as to the soundings taken by him after the vessel had anchored, shows conclusively that the vessel must have dragged her anchor at least 100 fathoms after she was brought up and the sail taken off her, and therefore in the comparatively short period during which the gale had lasted prior to the arrival of the steam-tug. It is true that the evidence of the mate in this respect is at variance with that of Pilot Woolnough, who says that from what the mate told him of the soundings there was only four feet water under the stern of the vessel. But it was the mate himself who took the soundings, and it would have been his duty at once to enter them in the log-book, which would remain in his custody available for reference, and to which I am bound to assume that he did refer before making his affidavit. The pilot, speaking from hearsay several months after the event, may have been mistaken in his recollection of what he was told by the mate, or he may have confounded what he was told at the time with his own subsequent impression of the position of the ship; but the case is different with the mate, who must in this matter either have wilfully deposed to a false statement, or must be accepted as stating the true result of his sounding. The evidence of the respondent Lewthwaite, and

of Messrs. Tapley and Underwood, shows that at the place where the anchor was lying when slipped there were 5 fathoms water; at from 15 to 50 fathoms from that spot, 4½ fathoms; at 90 and 100 fathoms' distance, 4 fathoms; then for 20 fathoms, 4 and 1-6th fathoms; and then at 130 fathoms, 3 and 5-6th fathoms. According to the evidence of the mate, he took soundings after the vessel was at anchor by direction of the pilot, and at a distance of 40 or 50 yards—20 to 25 fathoms from the stern of the ship, or 140 to 145 fathoms from the anchor—he found 4½ fathoms water; and at the main chain, which would be about 106 fathoms from the anchor, he found 5 fathoms, and these soundings were taken at low water. Now, comparing these soundings with those taken by Lewthwaite, Tapley, and Underwood, it will be seen that when the former were taken, the main chains, or centre of the vessel, must have been on the spot where the anchor was when slipped, for there the depth is 5 fathoms; while where the mate sounded astern, from 35 to 40 fathoms distant, the depth of water is 4½ fathoms, as found by him. Had the anchor, at the time of soundings being taken by the mate, lain where it was found by Tapley and Underwood, the soundings would have been at the utmost 4 fathoms at the main chains, and at the place where he sounded, 40 or 50 yards astern of the vessel, or about 140 fathoms from the position of the anchor when slipped, 3¾ fathoms. This evidence is so precise, that considering the circumstances under which it is given, I can have no hesitation in basing my conclusions upon it, and in holding that the "Electric" was saved by the services rendered by the steam-tug "Eleanor," not only from the danger, but I might almost say from the certainty of wreck; for if during the whole of the night she had only dragged as much as she had dragged during the few hours that the gale had lasted, before she was taken in tow, she must have gone on shore. And such being the case, it seems to me that the fact pressed upon me on behalf of the respondent, viz., that the vessel was in every respect tight, stanch, strong, and well found, and had sustained no injury or damage whatever, is only relevant as showing the value of the services rendered, and by which it was preserved for the owners in a similar condition. I may add that this inference as to the fact of the ship having dragged is corroborated by the evidence of Hannah Sandison and of Pinnington, and that I should not, under any circumstances, be disposed to attach importance to the evidence of those witnesses for the respondent who profess to give an opinion that the anchor could not have dragged from what they saw of

the appearance of the sand in its neighbourhood on the 10th February, nearly five months after the occurrence; for I take it that the ebb and flow of the tides up and down the Gulf would have long previously obliterated all traces of dragging such as are spoken to by the witness Pinnington, and have covered the anchor even if it had been lying nearly on the surface, as described by him. But if the ship was rescued from danger, then there is no question that the services performed by the steam-tug "Eleanor" were salvage services, and the only question is as to the amount of remuneration to which she is entitled. Upon this point I have felt and still feel much difficulty. Looking at the evidence, I am satisfied that in point of fact, not merely was the "Electric" saved from a position of very great danger, but the "Eleanor" ran considerable risk in effecting the service; and although I have the opinions of experts in Melbourne that this risk was incurred unnecessarily or imprudently, I confess I am not quite satisfied with their reasonings; and even if I were, I should not feel myself entitled altogether to disregard the fact that danger was actually incurred. With regard to the last fact, it will often happen that of different methods more or less dangerous of accomplishing the same object, some persons will consider one method and some another as being the best; and it will still more frequently happen that in the excitement of apprehended peril, and in the fear of failure from not doing enough, more will be done and risked than is quite necessary for the accomplishment of the end in view. But it would, I conceive, be contrary to the principles upon which the Court of Admiralty proceeds in these cases if I were to refuse compensation for a risk actually incurred by a person accustomed to the service in the *bona fide* belief that it was necessary for the accomplishment of the object, because, upon a calm review of all the circumstances, and upon the balance of evidence, I might think that a portion of that risk was not strictly necessary. So far, however, as the disconnecting of the engines is concerned, I confess that I am not satisfied with the reasonings of the witnesses. Their evidence is to the effect that disconnecting the engines is requisite to enable the paddles to be turned in a smaller space, and to give the steamer the power of maintaining a particular position, or regaining that position if driven to leeward with greater ease than with ordinary engines; and, so far as I can understand the matter, this might be as necessary or useful, in having to keep the same position when towing a vessel up to her anchors and holding her there against wind and tide for an hour and a half, while one anchor

was being taken in, as it would be in river or dock operations. And with regard to the risk incurred by putting greater pressure on the engines, the evidence satisfies me that considerable doubt was actually felt by those on board the "Electric" at the time, who knew the size and power of the steam-tug, whether she was capable of performing the service required, and therefore satisfies me also that the subjecting the engines to a considerable amount of pressure above that to which they were ordinarily subject, though at the possible risk of bursting, was, at any rate, a measure which the promoter Wells might reasonably believe to be necessary to enable him to get off the ship. Looking, then, at all the circumstances of the case—the imminent danger of the "Electric," the risk incurred by the steam-tug, the value of the two vessels, and the number of passengers on board of the "Electric"—I think the sum paid into Court inadequate, and I shall allow the salvors a further sum of £800. I have next to consider the case of the Pilot Woolnough and the crew of the cutter "Secret." In reference to this claim, the answer to the respondent has two aspects; it suggests that the position into which the ship was brought was owing to the incompetence or negligence of the pilot, and it denies that any service except pilotage service was rendered by him. The first aspect is very important, because if the dangerous position of the ship was due to the mistake of the pilot, to whom, from the moment of his coming on board, its management was entrusted, then, certainly, whatever might be the services subsequently rendered, I should not consider him entitled to any salvage remuneration. But upon a very careful consideration of the evidence, I have arrived at the conclusion that there is no ground for impugning the propriety of the orders issued by the pilot, and that the evidence of the respondents on this point is not of a character to entitle it to credit. All the evidence concurs to show that the weather was moderate; that the "Electric" was hove-to until the cutter came within hailing distance; that sail was then filled on her; that the cutter rounded-to on the windward side; that immediately upon the pilot coming on board he gave orders to have the anchors got ready, and then proceeded to put the ship about; and that upon the ship missing stays he ordered the anchors to be let go, which was done at once. All these circumstances are consistent with the account given by the promoters as to the position and course of the ship when boarded by the pilot; but they are not, as I conceive, consistent with the statement of the respondents as to the distance of the ship from the shore, and the direction in which she was

heading at that time. The respondents have abandoned that part of their responsive allegation which imputed to the promoter Woolnough a want of nerve and self-reliance, and there is no suggestion that he does not possess the requisite knowledge and judgment to qualify him for his office. I think, therefore, I am justified in assuming the course he pursued to be such as would be suggested to a qualified pilot by the position of the "Electric," having reference to the bearings of the Lightship, the direction of the land, and the proximity of the shore. That the cutter rounded to windward of the "Electric" is alleged in the act on petition, and not denied in the responsive allegation; and this is unaccountable unless in the judgment of those on board, consisting in part of pilots, there had not been room for her safely to round to leeward. The act of the pilot in giving orders, before attempting to put the vessel about, to get the anchor ready in case she should miss stays, as stated in the affidavit of Captain Lewthwaite, shows in the strongest way his opinion at the time; and the fact that immediately upon the ship missing he gave orders to let go the anchor, which was done at once, as implied in the evidence of the master and mate, and stated directly in the evidence of James Norris and Robert Smith, coupled with the evidence that the weather was moderate and a light wind blowing, satisfy me that the statements of the witnesses that the ship drifted in shore to any great extent after the pilot boarded her are unfounded; and this opinion is corroborated by two other circumstances. The first is, that the cutter hove-to after putting the pilot on board, and remained there until it left for Glenelg to take Captain Lewthwaite on shore; and I am unable to understand why this should have been done, excepting on account of the dangerous proximity of the land, in which the ship appeared to be. The other is, that the evidence for the respondent shows that some time before the pilot came on board—how long is only vaguely intimated, one witness says five or ten minutes, but it might have been much longer—soundings had been taken, and, as appears by the evidence of John Sullivan, the man called out 7 and 6½ fathoms; while at this time the ship must have been heading rather towards the shore. There is no direct evidence as to the depth of water outside the place where the anchor was lying; but if inside that point, in 160 fathoms, the water deepens pretty regularly from 3 to 5 fathoms, this raises a strong presumption that it would not be any greater distance outside that point before it deepened from 5 to 6½ fathoms. Looking, then, at all these circumstances, I am of opinion

that the "Electric" when boarded by the pilot was dangerously near the shore; that it would not have been prudent to have stood on further as she was then heading; and that it would have been impossible to have reached the Lightship on that tack. I am not able to determine to what causes the position of the ship was attributable, nor is it necessary that I should do so. Suggestions are made in some of the affidavits filed on behalf of the promoters as to the condition of the master, and as to alleged admissions made by him; but these statements, as I intimated on the hearing, cannot be referred to, as they are not relevant to any allegation in the act on petition. But if they were relevant they would not really affect the question with which I am concerned, which is not by whose act or default was the ship brought into a position of danger, but was it brought into such a position by the act or default of the promoter Woolnough. And this question I answer in the negative. There remains, then, the question whether any salvage services were performed by the pilot. Upon this point I agree that it is the duty of the Court to watch narrowly a claim like the present, and to take care that a pilot shall not be allowed, merely because the performance of his ordinary duty has involved some greater amount of danger or labour than is anticipated, to abandon his character of pilot and assume that of a salvor. Unquestionably the application of this rule, and of all rules which depend upon questions of degree, and where the circumstances to which they are to be applied may shade into each other by imperceptible gradations, will often be a matter of great difficulty, and I feel it to be so in the present case; and but for the keeping the cutter and afterwards sending it to convey the master to shore for the purpose of procuring the assistance of a steam-boat, I should have held, though not without some hesitation, that the services of the promoter Woolnough did not entitle him to salvage remuneration. But that act appears to me one which can only be regarded as an act of salvage. The promoter, Woolnough, in keeping the cutter hove-to near the ship, and in afterwards ordering it to take the master on shore for the purpose of procuring the services of a steam-tug, instead of allowing it to continue its course in search of ships requiring a pilot, must have believed that the ship was in a condition of peril, and the master in availing himself of these services must, I assume, have partaken in this belief, and there can, I imagine, be no question that such was the case. The ship was at the time, according to the evidence, within about a quarter of a mile from a

rocky shore, with the glass falling and the wind blowing in shore; and it contained a valuable cargo and some hundreds of immigrants. It was the duty of the master to take some measures to rescue the vessel, and the services of the cutter were voluntarily rendered for this purpose, while the pilot Woolnough remained on board. And although, as it happened, the obviously dangerous position of the ship was observed from the land, and communicated by telegram to Port Adelaide, so that the steamer had got up steam, and was in the act of leaving before the message from the master reached it, yet that does not disentitle the pilot and the crew of the cutter to salvage compensation for the services rendered. I therefore pronounce in favour of the claim of the promoter Woolnough, and allow him the sum of £100. With regard to the claim of the crew of the whale-boat "Herald," it is resisted upon two grounds, apart from the denial common to all the claims that the ship was in any position of danger—first, that whatever the crew did they did by order of Captain Duff, who was an officer of the Government, and in no way connected with the vessel; and secondly, that they abandoned the ship before the danger, if any, was at an end. Their claim, so far as it can be supported, rests upon the circumstance that they remained by the vessel for the purpose of rendering assistance in saving the lives of the passengers if it went on shore, for the assistance which they are alleged to have rendered in taking down the royal and topgallant-yards was not, I consider, under the circumstances, in the nature of salvage. There is nothing to show that the crew could not have performed this service, or that any danger attended it, or that it contributed in any degree to the ultimate rescue of the vessel. Nor can I regard their visit to the shore for the purpose of communicating with the Commissioner of Crown Lands of itself as a salvage service. It is not, I conceive, to be distinguished in principle from the rest of their conduct. The case, as regards these promoters, appears to be that, observing the position of the "Electric" from Glenelg they believed her to be aground, and they volunteered to accompany Captain Duff, the Harbour-Master at that place, to the ship; that on their arrival they saw the real position of the ship, and found that it was an immigrant vessel; and that they remained on board until the arrival of the steamer—assisting in the work of the ship, according to their statement; doing nothing according to the witnesses for the respondent—excepting for the time occupied in communicating with the Commissioner of Crown Lands, and that they so remained for

the purpose of rendering assistance in saving life had the vessel gone ashore. When the steamer arrived and declined to take the immigrants on board, intending to tow the ship off, they left for shore. I can have no doubt that this was service in the nature of salvage service. When persons voluntarily visit a ship in a position of danger for the purpose of rendering assistance, and remain on board in order to be ready to render such assistance if the occasion for it should arise, then although the occasion does not arise, the ship being relieved from its danger by other assistance, I think such persons are to be considered as salvors. Nor does it appear to me to be material whether they were induced to visit the ship or to remain with it by the persuasions or directions of Captain Duff, or by those of the pilot, or at their own suggestion. There are, I conceive, only three classes into which persons rendering assistance in cases of salvage can be distributed—persons under contract, persons holding offices in the public service which may impose such a duty upon them, and volunteers. These men were under no contract, and they did not fill any public office. They were, therefore, I conceive, volunteers. And, deciding upon the character of the services which they rendered—whether they were salvage or not—it is immaterial to consider what moved their will. Then, did they forfeit their claim to remuneration by leaving the vessel when they did? I think not. A steam-boat had arrived. They took a message to the master of that vessel, directing him to perform the service which they had remained to perform; and having done this, I do not think that they can be considered as having abandoned the service because they left for shore. They could not have rendered any assistance in transhipping the women and children to the steamer, and they might reasonably suppose that they would not be further needed. Looking at the risk they ran, and the dangerous service they remained to perform, I shall allow them the sum of £150. I feel it right to express my decided disapprobation of the conduct of the promoters in causing the ship to be arrested in the sum of £10,000. This is the first occasion of the sort in the colony, and I do not consequently feel myself justified in adopting the course which I shall certainly adopt in similar cases for the future, that, viz., of retaining in Court any sum allowed in order that an application may be made on behalf of the respondents for an allowance of whatever expenses they may have been put to by reason of the excessive bail demanded. But in the present case, though I allow all the promoters their costs, it will be an instruc-

tion to the Registrar to allow to the respondents out of the costs of the promoter Wells any expenses of possession which they may have paid beyond those of the first four weeks.

JUNE 18, 1866.

IN EQUITY.

MOSS v. THOMSON.

SPECIFIC PERFORMANCE. — Trial of Issues under Act No. 18 *of* 1862— *Construction of Agreement.*

THIS was a suit to compel the specific performance of an agreement for a lease of premises in Rundle Street. The bill sets out the agreement in the following terms :—"Adelaide, January 18, 1866.—Mr. A. Thomson —I have this day agreed to rent your premises and fixtures in Rundle Street, lately occupied by R. Miller, for the term of ten years, from 22nd instant; the first four years at £3 10s. per week, and the remaining six years at £4 4s. per week, payable weekly; and I agree to execute a lease containing the usual covenants to insure, repair, and keep in repair premises and fixtures, not to sublet or assign without the consent of landlord, to pay rates and taxes, and not to carry on any objectionable business. —JOEL MOSS. I accept the within terms.—ALEXANDER THOMSON, by his attorney, Jas. Thomson." In pursuance of that agreement the plaintiff took possession of the premises except the store at the back, in which Messrs. Gay & Son had some goods, but they promised to remove them and hand the key to the plaintiff. Subsequently, the defendant's attorney waited upon the plaintiff and informed him that the store was not included in the premises so agreed to be let, and the defendant refused to execute the lease of that part. The plaintiff thereupon filed his bill, alleging that, by the terms of the agreement, the store at the back was included. The defendant replied that it was not intended to be included. That being the question at issue between the parties, proceedings were taken under the Act No. 18 of 1862, by the first clause of which it is enacted that "The Supreme Court, or any Judge thereof, may in any suit on the equitable side of the Court, order that any issue joined in

such case, or any question of fact arising out of such issue, or out of any equitable proceedings in the Court, shall be heard and determined in open Court before one or more of the Judges of such Court, with or without a Common or Special Jury; and such issues or questions shall be tried at the ordinary sittings of the Court for the trial of issues in civil cases." The question in the suit submitted for trial before Mr. Justice Gwynne was—"Did the premises agreed to be leased by the defendant, include the portion of the back store mentioned in the bill of complaint?"

Attorney-General (J. P. Boucaut), *Way* with him, for the plaintiff, supported the affirmative of the issue, and called R. Miller, the former occupant of the premises, who proved that he formerly occupied the shop in Rundle Street, and that he had had possession of the back store which abutted on Twin Street, and was separated from the premises, terminating at the end of the depth of 102 feet by a private roadway or back yard. There were large gates. They were sometimes closed. That access was always obtainable by the wickets.

Thrupp, for defendant. There were two elements in the description of the property. It was said to be situated in Rundle Street, and to have been in the occupancy of Mr. Miller. The plaintiff's evidence showed that the back store was not in Rundle Street, but in Twin Street, and, therefore, from a reasonable and proper construction of the agreement, the back store was not included. I propose to call evidence to show what was the intention of the parties, and what was in their minds at the time of making the contract. The following cases were cited:—Doe dem Ashforth v. Bower, 3 B. & Ad. 53; Doe d. Tyrrell v. Lyford, 4 M. & S., 550; Chichester v. Oxenden, 3 Taunton, 147; Hiscox v. Hiscox, 5 M. & W., 363; Miller v. Travers, 8 Bingham, 244; and Paddock v. Fradley, 1 C. & J., 90. Evidence was given for the defendant that there were four shops facing Rundle Street, and the occupants had access to the back street from their back stores. There were two back stores, and the portion of the back store which the plaintiff sought adjoined Twin Street.

GWYNNE, J.—The evidence would be very good if the object was to reform the agreement on the ground of mistake before a Court of Equity. Here, however, the language of the agreement is plain—"Premises in Rundle Street, lately occupied by R. Miller;" not the premises as they stood after Miller left, but during his occupancy.

James Thomson, defendant's agent, proved that he agreed to let the plaintiff the premises, 102 feet from Rundle Street. At the time of entering into the agreement there was no one in possession of those 102 feet, but Messrs. Gay & Son were in possession of the portion of the store abutting upon Twin Street. I gave possession of the premises—the 102 feet—to the plaintiff. Handed him over the key of the shop and dwelling-house in Rundle Street the day upon which the agreement was signed. Did not give possession of the portion of the back store, nor did the plaintiff ask for possession, or say anything with regard to it.

Thrupp—The plaintiff in his bill had described the store as abutting upon the roadway, and not upon Rundle Street; and although Mr. Miller at one time occupied the whole of the premises, when the agreement was drawn out, Messrs. Gay & Son were in possession of the back store. Doe d. Humphreys v. Roberts, 5 B. & Ald., 407.

Way replied—It was clear, from the plaintiff's bill, what premises he claimed, and the description he gave of them was precisely the same as that contained in the former lease. Under a devise, the description "my premises in Rundle Street" would pass the back stores; and it was clear that the description given was sufficient, as the back stores were to be regarded as in Rundle Street, even had the words referring to the recent occupancy of Mr. Miller not been introduced.

Cur. adv. vult.

JUNE 26, 1866.

GWYNNE, J., delivered his judgment—In this case a question was referred to me to be tried under the Local Act, No. 18 of 1862, and the matter on the record was this:—Did the premises agreed to be leased by the defendant to the plaintiff include a portion of the back store mentioned in the bill of complaint? It appears from the evidence on the trial that Mr. Alexander Thomson, the defendant, is possessed of considerable property in Rundle Street, in Adelaide; but I need only refer to three holdings or tenements, having a frontage to Rundle Street, and divided into equal holdings of twenty feet each. One—the most easterly allotment—is occupied by Gay & Son; the next to the one in question

occupied by Moss, the plaintiff; and there is also one to the west of that. They are rectangular blocks of land with courtyards in the rear, used, as I gather from the evidence, in common by the occupants of the several tenements, and consequently by the occupier of the premises leased to the plaintiff. As it appears from the evidence, this courtyard exactly corresponds in length with Alexander Thomson's property. It runs east and west, and on the south side is a store, and in the corner is the part of the store which forms the subject of dispute. There is also a street—Twin Street—running north and south on the east side of the premises, and the courtyard communicates with this street by folding doors. They are wooden doors, and seem to have been generally unclosed during the tenancy of Mr. R. Miller; but it was given in evidence that subsequently they were removed and the posts only allowed to remain, and it was contended that that fact gave a more immediate and decided entrance from the store to Twin Street. The store about which this discussion arises is situated at the corner of the premises, and has a door facing towards the back part of the main building and towards Rundle Street. I may observe that from the evidence there is no window, door, or other aperture from the store into Twin Street. Then it appears that an agreement was entered into, and proved in evidence, between Alexander Thomson (by his agent James Thomson) and Moss, the plaintiff, and its terms are as follows :—"Adelaide, January 18, 1866.—Mr. A. Thomson —I have this day agreed to rent your premises and fixtures in Rundle Street, lately occupied by R. Miller, for the term of ten years from 22nd instant; the first four years at £3 10s. per week, and the remaining six years at £4 4s. per week, payable weekly; and I agree to execute a lease containing the usual covenants to insure, repair, and keep in repair premises and fixtures, not to sublet or assign without the consent of landlord, to pay rates and taxes, and not to carry on any objectionable business. Joel Moss. I accept the within terms.—Alexander Thomson, by his attorney, Jas. Thomson." The question raised upon the record and argued before me was, what did these words mean—"The premises and fixtures in Rundle Street lately occupied by R. Miller?" It would therefore appear that there are two certainties or demonstrations in reference to the premises demised. They were in Rundle Street, and were lately occupied by R. Miller. From Mr. Miller's evidence it seems the premises he occupied were precisely those which the plaintiff claimed to take under the agreement; and it is admitted on all hands that among these was the

part of the store in dispute. It is clear, then, that it comes under the second description, and my opinion also is that it comes within the other as being in Rundle Street. When it is said that the premises are in Rundle Street, it cannot mean that the whole of them should be in that street, but the substantial portion of them. It therefore appears to me this store is in Rundle Street, and forms part of the premises described in the agreement. *Mr. Thrupp*, counsel for defendant, contended that Rundle Street here was used partitively, if I may so term it, and that only one portion of the premises which Miller occupied were to be leased, and that the back store did not come within the description, as it was in Twin Street. It appears to me that this is a forced construction of the agreement, and the rule of law is, that where there is a plain and distinct meaning, the Court should accept it, and not any forced interpretation of which the words may be susceptible. I am decidedly of opinion that the premises taken under the lease are aptly marked, and that both descriptions apply to those which include the back store. Under the Act I have power to decree specific performance so far as the store is concerned.

The decree, therefore, will be for specific performance of the agreement, with costs of this enquiry, to be paid by the defendant.

OCTOBER 24, 1866.

IN EQUITY.

BUCK v. THOMAS.

PRACTICE—Demurrer to Plaintiff's Bill for want of Equity. Motion to take Demurrer off the files of the Court for irregularity, the Defendant not having demurred within the time prescribed by the rules to the Act No. 14 *of* 1853. *Held, that the* 8*th Rule was not warranted by the* 7*th section of the Act. Motion dismissed, but without costs.*

Bagot, for the plaintiff, moved that the defendant's demurrer be taken off the files of the Court, on the ground of irregularity.

Sandford, for defendants, objected to the notice of motion. It did not state the particular irregularity. There was a rule in Common Law

practice that the particulars of irregularity should be stated, and he apprehended it was the same in Equity.

HANSON, C.J.—The Court had not laid down any rule on the point in Equity proceedings.

Bagot said the Bill was filed to compel specific performance, to which a general demurrer had been filed on the ground of want of equity, and that no agreement in writing was shown on the face of the bill to satisfy the Statute of Frauds. I now move, under Equity Rules 7, 8, 9, for the demurrer to be taken off the files, on the ground that the defendant being required to answer, demurred alone, which he could not do even within ten days.

Sandford—Under the English practice there was a right to demur alone within twelve days from the expiration of the time for appearance. The Equity Act, clause 7, provides, that a defendant in a suit might, whether the plaintiff required an answer or not, demur to the plaintiff's bill within the time now allowed to the defendant for demurring alone to a bill. The defendant has appeared within ten days from the time allowed for appearance.

HANSON, C.J.—I think the 8th rule relied upon is not warranted by the 7th section of the Act. The motion must be dismissed, but without costs, as the defendant has been misled by the rule. The plaintiff to have time to set down the demurrer for argument.

OCTOBER 24, 1866.

EQUITY.

SCHUTT v. SCHUMACHER, EXECUTRIX, &c.

ADMINISTRATION SUMMONS.—Equity Act No. 14 *of* 1853, *s.* 57. *Defendant out of the jurisdiction. Ordered that substituted service of the summons on the attorney of the defendant was good service.*

THE defendant had proved the will of T. P. Schumacher, deceased, and

had proceeded to realise his estate. She then left the province, and went to reside in Germany, having first appointed J. B. S. her attorney.

The solicitor of the plaintiff proceeded under the 57th section of Act No. 14 of 1853, by taking out a summons calling upon the Executrix to administer the estate of the deceased. Mr. Belt then applied to the Court for, and obtained, an order that service of the summons and copy of the order upon her attorney might be deemed a good service.

NOVEMBER 2, 1866.

THE *Attorney-General (Mr. Boucaut)* now moved, upon notice of motion, to set aside that order. The question was whether the Court had power to order substituted service of an administrative summons. According to the 57th sec. of the Act No. 14, 1853, it was lawful for a Judge to grant administration on "proof by affidavit of the due service of the summons." There was a provision made for substituted service in bills, but not in regard to summonses; and Chief Justice Cooper had refused to allow it upon a Claim. Apart from the Act, there was a decision in the case of Lester v. Bond, 1 Drewry and Smales's Repts., page 392.

HANSON, C.J.—Then they would have to proceed upon bill?

The *Attorney-General*—They must either do that or serve the order personally.

HANSON, C.J.—I understand in this case the party is out of the jurisdiction, and therefore the summons could not be served personally. We will, however, look into the matter.

Cur. adv. vult.

DECEMBER 21, 1866.

Mr. Belt asked the Court for its decision in this case.

The *Attorney-General* opposed, on the authority of the case of Lester v. Bond, the Court had no power to order substituted service, the defen-

dant being out of the jurisdiction. In the case of Cohen v. Alken, relied on by the other side, the decision only referred to lands, tenements, and hereditaments, under the provisions of cap. 82, 4th and 5th William IV., and by the Equity Act, No. 14 of 1853, it was necessary service should be the same as in the case of a subpœna.

GWYNNE, J.—In the cases quoted the question was only raised as to service, not of the jurisdiction.

By the Court—Order to stand; one month to be allowed for appearance.

Order confirmed.

DECEMBER 14, 1866.

EQUITY.

ISABELLA HAWKINS AND ANOTHER v. CAROLINE HAWKINS AND OTHERS, INFANTS.

WILL.—Construction of—Held, no resulting trust in favour of the heir-at-law—Mining shares, and general personal estate—Held, not to pass under the words "all money at my banker's, and all money or moneys, or security or securities for money"—Property bequeathed "to be equally divided between them" (testator's daughters, Isabella, Caroline, Fanny Susannah, and Kate Hawkins) "or such of them as should survive and attain the age of 21 *years." Held, to be a contingent bequest, and no sale or division authorised, until the youngest daughter attained* 21.

THIS was a suit instituted for the purpose of obtaining a declaration by the Court upon the construction of the will of the late John Hawkins, of Cosford, near the Fourth Creek, South Australia. The bill prayed that the Court would declare the true construction of the devise and bequest of testator's freehold property to the plaintiffs, also of the personal estate devised to the plaintiffs, and whether such portions of it as are devised to Isabella Hawkins may be paid or secured to her, and that the personal estate devised to any of the defendants may be settled to such of them and in such manner as the Court should direct; also at what time and when the

said real and personal estate so devised should be divided. The testator, a widower, died on the 17th of July, 1866, leaving four daughters and one son, of whom the testator's daughter Isabella Hawkins alone had attained the age of 21 years. Shortly before his death testator made a will in the following form:—"I hereby appoint my eldest daughter, Isabella Hawkins, and my friend Alfred Spence, guardians to all my children during their minority; and I give, devise, and bequeath, in trust unto my eldest daughter, Isabella Hawkins, she being now of full age, and to my friend Alfred Spence, of Adelaide, all and singular my freehold and leasehold estates, messuages, lands, tenements, and hereditaments, whatsoever and wheresoever situate or found, with power to sell my said freehold estate or houses, or any part thereof, and power to give receipts for the money paid for such sale; the sale may be by public auction or by private contract, as my before-named trustees may agree or decide; also I give and bequeath to my aforesaid trustees all money at my banker's, and all money or moneys or security or securities for money, in trust for the benefit of herself my said daughter Isabella Hawkins, and or my daughter Caroline Hawkins, and of my daughter Fanny Susannah Hawkins, and my daughter Kate Hawkins, to be equally divided between all and each of such of them as shall survive and attain the age of 21 years. Nevertheless, it is my will and desire that my house, in which I with my family now reside, together with the 60 acres of freehold land in which it is situate, being part of Section No. 280, on the Fourth Creek, in the District of East Torrens, be reserved for the use and residence of my unmarried daughters, together with all the household furniture, goods, and chattels, plate, glass, books, pictures, bust, household linen, clocks, watches, jewelry, and all other matters and things thereto belonging, together with all horses, cows, poultry, carriages, harness, &c., for their use, free of rent or charge, so long as they shall require or desire them with full liberty to sell horses or cows, or exchange any of them, or buy others if they please with the proceeds. The proceeds of the estate when sold, and of all other matters and things sold, to be placed to the general account for division. Either of my daughters marrying with the consent and approval of my said trustees before attaining the age of 21 years, my said trustees have hereby power to give unto my daughter or daughters so marrying the sum of five hundred pounds sterling money, to be charged without interest as part of her portion under this my will, and to be settled on herself for her own separate use in trustees, free from the control of

any husband that she may marry. And in consideration of the trouble occasioned to my friend and trustee, Alfred Spence, he is to be permitted and allowed to charge one pound sterling as commission on every hundred pounds sterling for investing moneys under this my will, the investments to me made with the approval of his co-trustee, my daughter Isabella Hawkins, but no commission or charge to be permitted or allowed or any other matter or business done under this my will, and he my friend and trustee Alfred Spence is not in any way to receive money or to invest money without the consent and approval of his co-trustee my daughter Isabella Hawkins, and the trust to my daughter Isabella Hawkins is to be free from the control of any husband that she may marry, and her portion to be settled on herself in trustees for her own separate use. Should it on the marriage of my daughter and trustee, Isabella Hawkins, be thought better or necessary to relieve her of this trust, then if another trustee not her husband can be appointed with her approval let one be appointed, in which case the newly-appointed will be entitled to have half the legacy hereafter named or given to my friend and trustee Alfred Spence in consideration of his becoming my trustee and carrying out and fulfilling the provisions and directions of this my will. And I give and bequeath unto my friend and trustee or executor (if he shall become my trustee or executor) the sum of one hundred pounds sterling, to be paid to him or between him and any other trustee or executor that may be appointed when my property is divided amongst my daughters as aforesaid and directed."

Bagot for plaintiffs—Under the will the whole of the estate, including realty and personalty, passed to the trustees for division among the daughters, as the power to sell the real estate coupled with a direction to divide the proceeds had the effect of converting it into personalty. (Jongsma v. Jongsma, 1 Cox, 362; Fletcher v. Smiton, 2 Term Repts., Duruford and East, 656; Hogan v. Jackson, Cowper's Repts., 299; Mower v. Orr, 7 Hare Repts., 473.) The next question was as to the time when the division should take place. Isabella Hawkins, who had attained 21 years of age, was entitled to have her share immediately handed over to her or set apart for her, because it was evident the testator had in his mind a separation of the property when he made provision for £500 to be handed over to any of the younger children who should marry before she attained the age of 21, while no such provision was made in

reference to the eldest daughter who was one of the trustees, the provision in the will being that if she married the portion should be settled upon her for her separate use. There did not appear to be any express provision that the property should be handed over to her before her marriage, but the effect of the meaning of the whole will was evidently such. There was no devise over, but she was to take the property absolutely. The legacy of £100 to Mr. Alfred Spence was an absolute bequest, and should be handed over to him on the understanding that if ever another trustee should be appointed he should repay to him his half of the legacy. The whole of the real and personal estate not bequeathed in express terms passed under the terms "*all other matters and things*," and that as the name of the heir-at-law was not mentioned, it was evidently the intention of the testator to will all the property to his daughters, and that the plaintiff Isabella Hawkins was entitled either to absolute possession of her share or that it should be invested separately for her use and management. As to the point of conversion of the real estate into personalty, I would refer to the cases of Grieveson v. Kersop, 2 Keen's Reps., 653; Robinson v. Robinson, 19 Beavan, 494; Burrel v. Baskerfield, 11 Beavan, 525; Rigden v. Pierce, 6 Maddock's Reps., 353.

Mr. Attorney-General, on behalf of the defendants, Caroline Hawkins, Fanny Susannah Hawkins, and Kate Hawkins, who were in the same interest, argued that according to numerous decisions, the whole of the estate, personal and freehold, must pass under the terms of the will for general division among the daughters (Doe v. Langlands, 14 East's Reps., 370; also Pratt v. Sladden, 14 Vesey, 193), and under the Statute Law an executor would be entitled to sell all property that was not otherwise specially devised; but in the present case the testator had by express words taken away the only contention which the other side could have, and showed that his intention was to devise everything away from the heir-at-law. The Court would always, if they possibly could, construe a will against intestacy, according to the authority of West v. West, 9 Jurist, N.S., 400; Booth v. Booth, 4, Vesey, jun., 399; and Leake v. Robinson, 2, Merivale's Report, 363; and where the intention of the testator was to be gathered, though not skilfully expressed, the Court would give effect to it, and the evident intention of the testator was that the latter portion of property mentioned, as well as the former, should be divided among his daughters. In answer to the Court, the interest of the whole of the

daughters was a vested and not a contingent interest, the time of payment only being liable to be affected, according to the date of marriage. (Jarman on Wills, and in the trust of Thomas Bartholomew, 1 Macnaghten & G. 354.)

HANSON, C.J.—That case does not apply, as in this case the property was to be divided only between such of the daughters as should attain the age of 21.

Belt—I submit on behalf of John Montague Hawkins, that he as heir-at-law was entitled to the whole of the realty under a resulting trust, subject to the qualification of reserving for the daughters' use while they should require it the residence and furniture, and also to such of the personal property as was not specifically devised. The suggestion of conversion did not apply to the testator's realty, which continued to be realty at the time of his death, and which was devised to the trustees with only the option to sell, and not impressed with a trust. If the question of conversion ever should arise, the claimants would not be the parties at present before the Court; but they would be the real and personal representatives of the heir-at-law. The cases of West v. West, and Booth v. Booth, which had been relied upon, differed from this in that they contained a residuary gift, which did not exist in the present instance, and therefore they were inapplicable, and the only way in which the proceeds of the Cosford Estate, when sold, could be construed to pass to the general account for division would be, that it should be a division in which the heir-at-law should take the proceeds of the real estate, and all the testator's children should share as the testator's next of kin in the proceeds of the personal estate. The testator in his will gave the estate to trustees, who were appointed guardians for all his children, and there was nothing to show the heir-at-law was not entitled to the real estate under a resulting trust (Elcock v. Mapp, 3 House of Lords Cases, 492 and 507; Hill v. Cock, 1 Vesey and Beams, 173; King v. Dennison, Ibid, 260; Southouse v. Bate, 2, Ibid, 396). To exclude the heir-at-law from participation it was not only necessary to state that in the will, but also to mention some other person to whom the property should go. (Fitch v. Weber, 6 Hare's Repts., 145; and Johnson v. Johnson, 4 Beavan, 318.) The following authorities were cited, in support of the argument by the learned counsel:—that a bequest of "moneys and securities for money"

does not include shares or debts, and that therefore the testator's Moonta and other shares would pass to the testator's next of kin as undisposed of personalty. (Earl Poulett v. Hood, 35 L.J., Chancery, 253; Slingsby v. Grainger, 7 House of Lords Cases, 283; Barrs v. Fewkes, 33 L.J., Chancery, 484; Turner v. Turner, 21 L.J., Chancery, 422 and 843; Huddleston v. Gouldsbury, 10 Beavan, 547; Barry v. Harding, 1 Jones and Latouche, 475; and *in re* Mason's Will, 34 L.J., 603.

Cur. adv. vult.

MARCH 5, 1866.

GWYNNE, J., delivered the judgment of the Court. In this case a bill has been filed for the purpose of obtaining the opinion of the Court as to the proper construction of the will of the late Mr. John Hawkins. The defendants by their guardians have appeared and answered, stating that they are infants, and submitting their rights to the protection of the Court. It appears by the bill that the testator by his will, dated 2nd March, 1866, after appointing his eldest daughter, Isabella Hawkins, and his friend, Alfred Spence, guardians of all his children during minority, disposes of his real and personal estate in the following words:—"I give, devise, and bequeath in trust unto my eldest daughter, Isabella Hawkins, she being now of full age, and to my friend, Alfred Spence, of Adelaide, gentleman, all and singular my freehold and leasehold estates, messuages, lands, tenements, and hereditaments, whatsoever and wheresoever situate or found, with power to sell my said freehold estate or houses or any part thereof, and power to give receipts for the money paid for such sale; the sale may be by public auction or by private contract as my before-named trustees may agree or decide. Also, I give and bequeath to my aforesaid trustees all money at my banker's, and all money or moneys, or security or securities for money in trust for the benefit of herself my said daughter Isabella Hawkins, and of my daughter Caroline Hawkins, and of my daughter Fanny Susannah Hawkins, and of my daughter Kate Hawkins, to be equally divided between all and each of such of them as survive and attain the age of twenty-one years." On this *Mr. Belt*, for the heir-at-law, contends that the declaration of trust applies only to the personalty, leaving, therefore, a resulting trust of the real estate in favour of the heir-at-law. It is true that the clause of the will declaratory of the

trusts in favour of the daughters is in juxtaposition with the bequest of the personal estate, and that the devise of the real estate is not connected with it by expressions as clearly as it might be; but still we think that the ordinary and proper construction is that both the devise and the bequest are governed by the declaration of trust in favour of the daughters. We are confirmed in this view from other parts of the will. For instance, the testator directs that the Cosford property "be reserved for the use of his unmarried daughters." We ask, reserved what from? The answer seems to us to be from division amongst the daughters. It is obvious, however, that such reservation would be unnecessary, unless it was the intention of the testator that his real estate should be subject to the trusts declared in favour of his daughters. There is also at the close of the will this expression—"*when my property is divided amongst my daughters as aforesaid.*" The word "property" may include both real and personal estate, and we think it was used by the testator in that sense. We are therefore unanimously of opinion, on this part of the will, that the whole of the testator's real estate goes to his daughters, in absolute exclusion of his son and heir-at-law. The question also was raised on the hearing of this cause whether the shares of the daughters—namely, Caroline Hawkins, Fanny Susannah Hawkins, and Kate Hawkins—were vested or contingent interests. By the will the property *is to be equally divided between all and each of such of them as survive and attain the age of* 21 *years.* We think their interests are contingent, depending upon the condition of their living to the age of 21 years. It is unnecessary, perhaps, to observe that Miss Isabella Hawkins (being now 21) takes a vested interest in her fifth part or share of the estate, and in the event of the death of all or any of her sisters under 21, the whole or part, as the case may be, of her sisters' shares will accrue to her. As to the question raised for our opinion, whether Miss Isabella Hawkins is now entitled to receive her share, we think not. On referring to the will, it appears that the division is not to take place until the youngest daughter is 21 years of age; and the will contains no provisions for investing the proceeds in the event of a sale during the minority of the four daughters. But in no case can Miss Isabella Hawkins receive her share, original or accruing, as by the will her portion is directed "*to be settled on herself in trustees for her own separate use.*" We have therefore come to the conclusion that it was the testator's intention that no sale should take place until the time of the division of

the estate had arrived—that is, when the youngest daughter is 21; of course this period may be accelerated by death. The only other question pressed upon our consideration was, what fund is applicable to the support and maintenance of the children of the testator? With regard to this it is to be observed that the will is silent as to the maintenance, education, and advancement of the infant children, except that the trustees have the power to advance £500 to any of the infant daughters marrying before 21, with consent of the guardians; nor does the will expressly give any directions as to the accumulation or make any other provision of the annual income of the contingent shares. A difficulty arises from the circumstance that the shares of the infants are contingent. But, notwithstanding this, it appears to us that with the consent of Miss Isabella Hawkins there will be no difficulty in this Court directing that the whole of the annual income of the four contingent shares, or such part thereof as the Master shall consider sufficient, shall be appropriated towards the maintenance of the infants. To show that this Court would be warranted in such a direction I refer to the case of Greenwell v. Greenwell, 5 Vesey, jun., p. 194, and Cavendish v. Mercer, Id., p. 195, note, and cited and approved by the Master of the Rolls in Fairman v. Green, 10 Vesey, p. 48, who in giving judgment, says:—"The Court has not done this except where all the parties who were to have maintenance were equally interested. If there are three children, the property is given to one, and if he dies under 21, then to the others, there is an equal chance of all attaining the age of 21. But if there is any legatee over, the Court has always taken the consent of that legatee." We therefore direct the Master to settle what is proper to be allowed for the maintenance of the infants for the time past since the death of the testator and for the time to come. We do not refer it to the Master to enquire whether it is for the benefit of the infants that the whole or part of the income of the contingent shares should be appropriated to their support; we adjudge that ourselves. In reference to the points raised, the bill was filed not for the purpose of having an account taken, but for getting the opinion of the Court on certain points, and as it did not ask what quantity of the property was to pass, the Court did not think it necessary to offer an opinion. In reference to the question asked by *Mr. Belt*, what was to be considered as money, I am unable to express any particular opinion. The will said, "All money at my banker's, and all money or moneys or security or securities for money,"

should pass to the daughter. As to what was money, I apprehend there would be no difficulty. As to securities, they comprised bills of exchange, bonds, or mortgages, and the Court did not think the shares passed, but that they would go for distribution among the children, in which the heir-at-law as one child would participate. But whether any particular thing was money or security for money must depend upon the circumstances, which were not before the Court.

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